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ABSTRACT

This document examines a major civil rights decision handed down by the Supreme Court in Firefighters Local Union No. 1784 v. Stotts (1984). The decision is examined for its importance in determining the extent to which seniority systems may or must be overridden as part of court-ordered relief to remedy discrimination in employment, and also for its effect on a trial court's remedial authority over hiring and promotion. The document: (1) provides a case summary, including details of concurring opinions of Justices O'Connor and Stevens and the dissenting opinion of Justice Blackmun; (2) presents the complete text of the Stotts decision; (3) discusses the significance of the Stotts decision for the scope of consent decrees, for layoffs, seniority and merit systems and preferential relief, and for judicial relief in hiring and promotion; (4) presents a statement of the United States Commission on Civil Rights concerning the Detroit Police Department's Racial Promotion Quota; and (6) presents a statement of the United States Commission on Civil Rights concerning the Stotts decision. The document also includes the concurring and dissenting statements of individual Commissioners and an exchange concerning the Stotts decision that was previously printed in "The New York Times." (RDN)

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Toward an Understanding of *Stotts*

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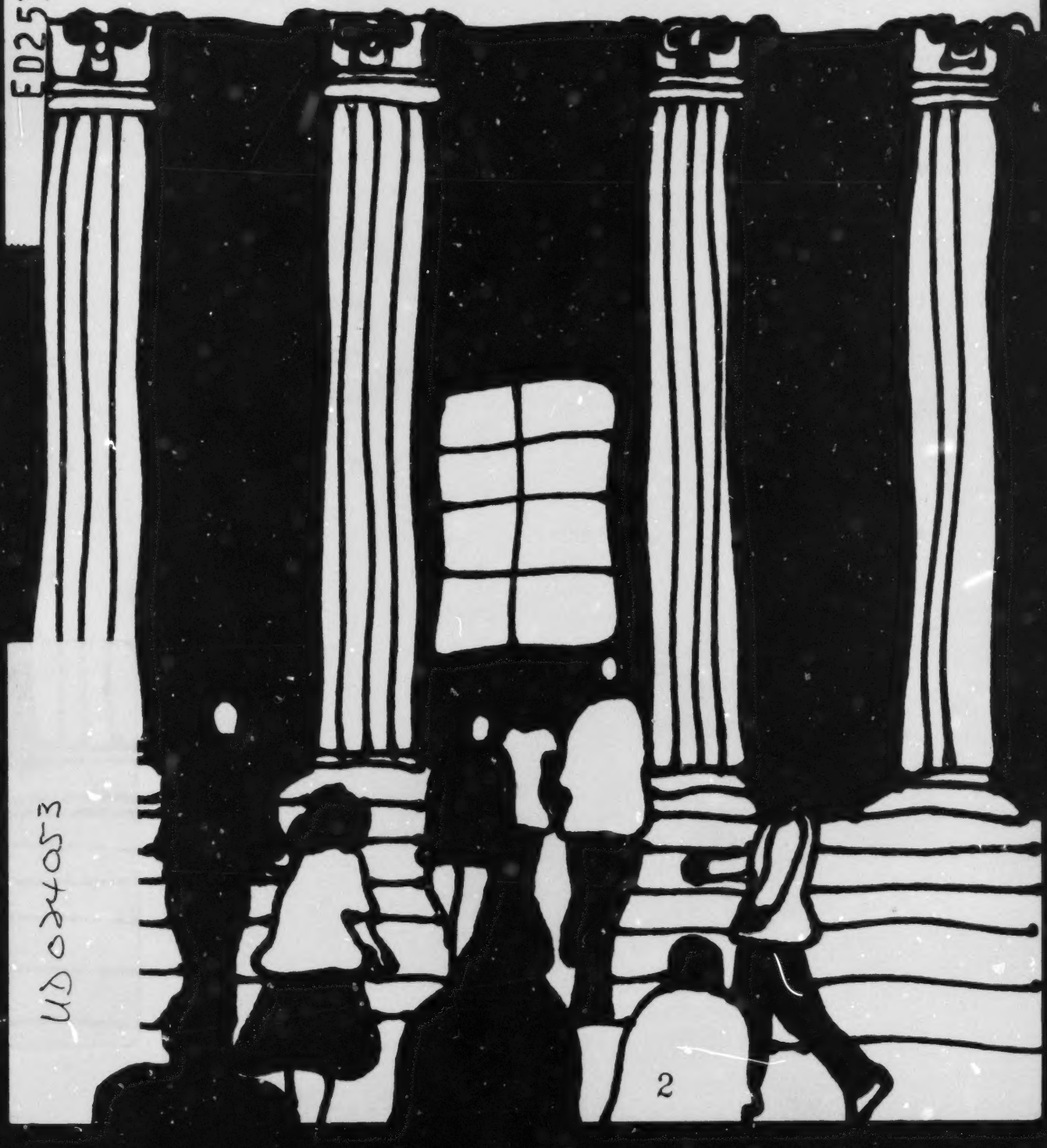

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Preface

On June 12, 1984, the United States Supreme Court handed down a major civil rights decision, *Firefighters Local Union No. 1784* v. *Stotts*, 104 S. Ct. 2576 (1984). The decision has generated public controversy and fueled already existing debate on a court's authority to order relief under Title VII of the Civil Rights Act of 1964 to remedy discrimination in employment. As the introduction in this publication explains, the Court said in *Stotts* that a court may not, under Title VII, order an employer to lay off employees with greater seniority in favor of employees with lesser seniority, in disregard of a bona fide seniority system, for the purpose of preserving a certain percentage of a racial minority in the work force. There is dispute about the extent to which this decision applies to other employment decisions, such as hiring and promotion. Many observers have focused on whether the decision spells an end to the use of quotas and other preferential treatment in court-ordered relief under Title VII and requires that a court extend relief only to actual victims of an employer's discrimination. Clear answers to these and related questions on this pivotal civil rights issue are needed.

The Office of General Counsel prepared this publication. In the past, this agency has disseminated publications discussing important Supreme Court cases, such as *Toward an Understanding of Bakke* (May 1979). This publication is intended to increase public understanding of the scope of a court's authority to order relief under Title VII for discrimination in employment by making readily available the complete text of the *Stotts* decision, a brief introduction to the case, a detailed case summary of the opinion, an analysis of the meaning and significance of the *Stotts* decision, the Commission's statement on the Detroit Police Department's racial promotion quota, and the Commission's statement on the *Stotts* decision. The publication also includes the concurring and dissenting statements of individual Commissioners and an exchange concerning the *Stotts* decision previously printed in the *New York Times*. This publication was prepared in the hope that its widespread dissemination will contribute to an informed public understanding of the critical issue of the scope of a court's authority under Title VII to remedy employment discrimination.

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Introduction

On June 12, 1984, the United States Supreme Court issued a major decision in civil rights law. *Firefighters Local Union No. 1784* v. *Stotts* concerned an issue that has recently captured great public interest, namely, the extent to which seniority systems may or must be overridden as part of court-ordered relief to remedy discrimination in employment. A majority of the Court held that, under Title VII of the Civil Rights Act of 1964, a court may not order an employer to lay off more senior employees in favor of less senior employees on the basis of race, in derogation of a bona fide seniority system, for the purpose of preserving a specific percentage of racial minority employees.[1] Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin.[2]

The case did not concern hiring or promotion decisions by employers. The case, however, is highly important because the Supreme Court's interpretation of the scope of a court's remedial authority under Title VII significantly affects a trial court's remedial authority respecting hiring and promotions. A pivotal basis for the result reached by the Court in *Stotts* is that, under Title VII, a court may extend relief for past employment discrimination only to actual victims of an employer's discrimination. Much debate concerns the effect of this interpretation of Title VII on affirmative action remedies, such as quotas, that may be ordered by a court. A reasoned analysis of the Court's decision in *Stotts* leads to the conclusion that quotas or other devices which benefit nonvictims of an employer's discrimination are not permissible court-ordered relief for employment discrimination in any phase of the employment relationship—hiring, promotion, or layoff—under Title VII. Relief under Title VII, then, may include only an injunction to end all discriminatory employment practices, make-whole relief for actual victims of an employer's discrimination, and nondiscriminatory affirmative action such as increased recruiting.

At the time of the *Stotts* decision, many lower court orders in Title VII cases provided for layoffs on the basis of race as a means of preserving a particular remedy for discrimination, whether or not the persons benefited by the preferential layoffs had ever been discriminated against by the employer. Many of these orders are expected to be challenged on the basis of *Stotts*. Other cases in which a court has ordered hiring or promotion of employees on the basis of race, without regard to whether the person preferentially hired or promoted has ever been a victim of discrimination, will also undoubtedly be challenged.

The facts in *Stotts* are important to an understanding of the conclusions reached by the Court. In 1977 Carl Stotts, a black firefighter in the Memphis, Tennessee, Fire Department, brought a class action lawsuit in a Federal district court. He alleged that the department and various city officials had engaged in discriminatory hiring and promotion practices in violation of Title VII of the Civil Rights Act of 1964. In 1980 the court entered a consent decree (an order to which the parties have agreed) requiring backpay

[1] The Supreme Court reversed the judgment of the court of appeals by a vote of 6–3. Five of the six Justices joined in the majority opinion. The sixth Justice, Justice Stevens, issued a separate concurring opinion, voting for reversal on narrower grounds than the five other Justices.

[2] 42 U.S.C. §2000e *et seq.* (1982).

for and promotion of various individuals. The decree also required that the percentage of black employees in each job classification in the department be increased to the proportion of blacks in the local labor force. The court retained jurisdiction to enter any other orders that would be necessary to carry out the consent decree. The consent decree contained no provisions regarding layoffs or award of seniority. The 1980 decree paralleled a 1974 decree that settled a discrimination case brought against all departments of the city by the United States.

In 1981, as a result of budget problems, the city planned to lay off employees of the fire department on the basis of the city's "last-hired, first-fired" rule, adopted earlier in a "memorandum of understanding" between the city and the Firefighters Union. Black firefighters asked the court to prohibit the layoff of black employees. The court ordered the city not to apply its seniority policy in a manner that would reduce the percentage of blacks in the department. On appeal, the United States Court of Appeals for the Sixth Circuit upheld the district court order, and the case was then appealed to the United States Supreme Court.

In an opinion by Justice White, the Supreme Court disposed of several issues, including determining that the case was not moot[1] and analyzing the meaning and impact of the consent decree. These issues are discussed in greater detail in the case summary portion of this publication.

The Court then considered the most far-reaching and thoroughly discussed argument in favor of the lower court's order preventing the city from using its seniority policy in a manner that would reduce the percentage of blacks in the fire department. The argument was that if Stotts had proven at trial that the fire department and city officials had engaged in discriminatory hiring and promotion practices, the court could have ordered the relief it did in prohibiting the layoffs of less senior black employees over more senior white employees. The Supreme Court said, however, that the lower court had no authority to disregard the seniority system unless the system itself was intentionally discriminatory. Moreover, although a court could order competitive seniority relief for actual victims of discrimination in order to restore them to their rightful place in the seniority system, mere membership in the disadvantaged class was an insufficient basis for judicial relief. The Court said that the Memphis seniority system was not intentionally discriminatory and that there was no finding that any of the blacks who were protected from the layoffs had been actual victims of discrimination.

The Court noted that section 703(h) of Title VII permits the routine application of bona fide seniority systems so long as there is no intention to discriminate on a prohibited basis. Significantly, the Court also noted that the conclusion that a court can award seniority only to a person who has been a victim of illegal discrimination is consistent with the policy behind section 706(g) of Title VII, which governs remedies available in Title VII cases generally, including in the hiring and promotion phases of the employment relationship. The Court stated that the policy behind section 706(g) is to provide relief only to actual victims of discrimination. The Court cited key legislative history from the Civil Rights Act of 1964 and the 1972 amendments to Title VII supporting its interpretation. Since none of the rationales supported the order of the lower court, the Supreme Court reversed that decision and permitted the application of the seniority policy. Its decision, although addressing a layoff situation, is equally applicable to other aspects of the employment relationship such as hiring and promotion. Justice White's majority opinion is fully discussed in the case summary section.

The concurring opinions of Justices O'Connor and Stevens, and Justice Blackmun's dissenting opinion, which was joined by Justices Brennan and Marshall, are also described in the case summary.

[1] A case is moot when there is no longer a concrete controversy or real dispute between the parties. Federal courts are not permitted to decide moot cases. *See* U.S. Const. art. III.

Case Summary

In *Firefighters Local Union No. 1784* v. *Stotts*,[1] five Justices of the U.S. Supreme Court[2] decided that a consent decree, between the city of Memphis and black firefighters remedying alleged violations of Title VII of the Civil Rights Act of 1964 in hiring and promotions, does not give a district court authority to enjoin layoffs undertaken in accordance with a seniority system that is "bona fide" and not adopted and applied with an intent to discriminate on the basis of race. Thus, the decision reversed the judgment of the Court of Appeals for the Sixth Circuit, which had upheld a lower court order enjoining the city from applying its seniority policy in a manner decreasing the percentage of blacks then in the fire department. The Court construed section 703(h)[3] of Title VII to insulate such "last-hired, first-fired" procedures from legal challenge under Title VII and stated that this ruling is consistent with the "policy" behind section 706(g),[4] which is to provide make-whole relief, such as awards of competitive seniority, only to the actual victims of illegal discrimination.

Justice Stevens concurred in the Court's judgment based on his reading of the consent decree at issue, but did not find that the case required reaching any Title VII issues. Justice O'Connor, in addition to joining the majority's opinion, issued a concurring opinion. Justice Blackmun, joined by Justices Brennan and Marshall, dissented on the grounds that the case was moot and that the district court had authority under both the consent decree and Title VII to issue a preliminary injunction to prevent decreasing the percentage of black firefighters then employed.

Factual Background

In 1977 the respondent, Carl Stotts, a black firefighter in the Memphis, Tennessee, Fire Department, filed a class action lawsuit in a Federal district court alleging that the Memphis Fire Department and various city officials had engaged in a pattern and

[1] 104 S.Ct. 2576 (1984).

[2] Justice White wrote the majority opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor.

[3] Section 703(h) provides in relevant part:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . .provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

42 U.S.C. §2000e–2(h) (1982).

[4] Section 706(g) governs the remedies available in Title VII litigation and provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . .or any other equitable relief as the court deems appropriate. . . .No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of §704(a) of this title.

42 U.S.C. §2000e–5(g) (1982).

practice of making racially discriminatory hiring and promotion decisions in violation of Title VII of the Civil Rights Act of 1964. Following settlement negotiations, a consent decree, designed to remedy hiring and promotion practices with respect to blacks, was approved and entered by the court on April 25, 1980. Under the decree, the city denied that it had violated any laws, but agreed to promote 13 named individuals, to provide backpay to 81 employees of the fire department, and to adopt a long-term goal of increasing the proportion of minority representation in each job classification to approximately the proportion of blacks in the labor force in Shelby County, Tennessee. The district court retained jurisdiction "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." *Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576, 2581, *rev'ing* 679 F.2d 541 (6th Cir. 1982).

The 1980 decree paralleled a 1974 consent decree that the city had signed after the United States brought a suit against it for discriminatory hiring practices. Neither of the decrees contained provisions for layoffs or demotions, or awarded competitive seniority. The 1974 decree did require, however, that "for purposes of promotion, transfer, and assignment, seniority was to be computed 'as the total seniority of that person with the City.'" *Id.* at 2581. Between 1974 and 1980, blacks made up 56 percent of the employees hired in the fire department, and the overall percentage of black employees increased from 3 or 4 percent to 11½ percent. *Id.* at 2582.

In May of 1981, as a result of expected budget deficits, the city planned to lay off nonessential personnel throughout the city government based on the city's "last-hired, first-fired" rule. The plan permitted a senior employee whose position was abolished to "bump down" to a lower ranking position to avoid being laid off. *Id.* at 2582. The layoff policy was adopted pursuant to a 1975 "memorandum of understanding" between the city and the Firefighters Union. *Id.* at 2582, 2585 n.7.

On May 4, 1981, the respondents requested the district court to prohibit the layoff of black employees. The union, which was not a party to either of the decrees, intervened. Shortly thereafter, the district court enjoined the city from applying its seniority policy insofar as it decreased the percentage of black firefighters employed at that time. The court based its injunction on the premise that, although the seniority-based layoff procedure was not adopted with any intent to discriminate, its implementation would have a racially discriminatory effect (15 of 40 workers to be laid off would have been black), and that the seniority system was not bona fide. The city then implemented a modified layoff plan in conformity with the injunction, which resulted in three whites being laid off while three blacks with less seniority were retained. *Id.* at 2852 n.2.

The Court of Appeals for the Sixth Circuit found that the district court erred in holding that the city's seniority system was not bona fide. Nonetheless, it held that the modification of the 1980 decree was "permissible under general contract principles because the City 'contracted' to provide 'a substantial increase in the number of minorities in supervisory positions' and the layoffs would breach that contract." *Id.* at 2582. Alternatively, the appellate court ruled that, due to unforeseen circumstances that created a hardship for one of the parties to the decree, the district court was authorized to modify the decree. Finally, the court of appeals rejected the argument that the modification was improper because it conflicted with the city's seniority plan, allegedly immunized under section 703(h) of Title VII.

Mootness

The initial part of the Supreme Court's analysis gave several reasons for finding that the case was not rendered moot[1] even though all of the white employees who were affected by the injunction were restored to duty after 1 month or offered their former positions.

First, the Court ruled that the district court's injunction forbidding layoffs by seniority was still in force and "unless set aside must be complied with in connection with any future layoffs." *Id.* at 2583. Second, the Court stated that the district court had ruled that the 1980 consent decree must be construed to mean that layoffs were not to reduce the percentage of blacks employed in the fire department and that the city's seniority provisions must be disregarded for the purpose of maintaining such percentages. If these rulings were left intact, "the City [would] no longer be able to promise current or future employees that layoffs will be conducted solely on the basis of seniority. . .[which] has traditionally been, and continues to be, a matter of great concern to American

[1] A case is "moot" when the parties no longer have a concrete interest in its outcome, rendering the Court's opinion advisory in nature rather than decisive of an actual "case or controversy" between the parties. Federal courts may not decide moot cases. *See* U.S. Const. art. III.

workers." *Id.* at 2583–84 n.4. Third, the Court found that the judgment would have a "continuing effect" on the city's management of the department because white employees who were laid off or demoted might have "make whole" claims for losses in pay and seniority. Although the amounts involved might be small, the need to resolve the rights of these individuals gives all parties a "concrete interest in the outcome of the litigation. . . ." *Id.* at 2584. The Court concluded: "Respondents cannot invoke the jurisdiction of a federal court to obtain a favorable modification of a consent decree and then insulate that ruling from appellate review by claiming they are no longer interested in the matter, particularly when the modification continues to have adverse effects on the other parties to the action." *Id.* at 2585.

Authority to Enjoin the Layoffs

The next section of the Court's opinion considered "[t]he issue at the heart of this case[:]. . .whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." *Id.* This section of the opinion first interpreted the decree itself and then addressed the district court's "inherent authority" to modify the decree.

Interpretation of the Consent Decree

The Court stated that the court of appeals' interpretation of the language within the "four corners" of the consent decree did more than merely enforce its express terms. The Court found that the decree neither mentioned layoffs nor demotions nor made any suggestion that it intended to depart from the existing seniority system or from the city's arrangement with the union. If the parties had intended the district court to depart from the seniority rules with respect to layoffs, the Court stated, then it would be reasonable to believe that an express provision concerning the issue would have been included in the consent decree.

The Court found equally unconvincing the lower court's conclusion that the injunction was proper because it carried out the stated purposes of the 1980 decree, which were to remedy past hiring and promotion practices of the fire department. The Court noted that the remedy in the decree did not include the displacement of white employees with seniority over blacks. The Court also observed that it was reasonable to believe that any remedy in the consent decree would not exceed the bounds of relief appropriate under Title VII: "Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern or practice suit such as this." *Id.* at 2586. The Court reasoned that absent an express provision in the decree mandating such a "remedy," the city had no intention to depart from its seniority system. The Court found that, because neither the union nor the nonminority employees were parties to the case when the decree was entered in 1980, it was "highly unlikely" the city would "bargain away nonminority rights under the then-existing seniority system." *Id.*

Authority to Modify a Consent Decree

The Court next considered judicial authority to modify the consent decree. The Court explained that, according to *Teamsters v. United States*,[6] section 703(h) of Title VII immunizes "bona fide" seniority systems; that is, it "permits the routine application of a seniority system absent proof of an intention to discriminate." *Id.* at 2587. Accordingly, the Court rejected the holding of the court of appeals that the district court had "inherent authority" to modify a consent decree when an economic crisis unexpectedly required layoffs undermining the affirmative action outlined in the decree, even if such modification conflicts with a bona fide seniority system. *Id.* at 2586–87.[7]

[6] 431 U.S. 324 (1977).

[7] The Court noted that a district court's authority to modify a consent decree "is not wholly dependent on the decree. '[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree." *Id.* at 2587 n.9 (quoting an earlier Supreme Court case). In short, parties seeking a consent decree in a Title VII case cannot obtain court approval of such a decree if it exceeds the relief the court itself could grant:

> Thus, Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the City; "the issue cannot be resolved solely by reference to the terms of the decree and notions of equity. Since. . .Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination, the District Court was precluded from granting such relief over the City's objection in this case.
>
> *Id.*

The Court addressed the "three alternative rationales" that the court of appeals had articulated for the "inherent authority" of the district court to modify the decree. First, the court of appeals had stated that the injunction was proper on the basis of "a 'settlement' theory, i.e., that the strong policy favoring voluntary settlement of Title VII actions permitted consent decrees that encroached on [bona fide] seniority systems." *Id.* at 2587. The Court found this theory was inapplicable because there was no "settlement" with respect to the disputed issue; the parties had not agreed as part of their settlement to depart in any way from the seniority system.

The Court next rejected the court of appeals' second theory, that if the allegations in the complaint had been proven, the district court could have entered an order overriding the seniority system and that, therefore, authority existed to override the bona fide seniority system in order to effectuate the purposes of the 1980 decree.

The Court disagreed with the premise of the argument. This approach, the Court said, "overstates the authority of the trial court to disregard a seniority system in fashioning a remedy after a plaintiff has successfully proved that an employer has followed a pattern or practice having a dicriminatory effect on black applicants or employees." *Id.* at 2588. The Court noted that "[i]f individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster." *Id.* Citing *Teamsters*, the Court explained that "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." *Id.*[8] In this case, however, "there was no finding that any of the blacks protected from layoff had been a victim of discrimination and no award of competitive seniority to any of them." *Id.* The Court concluded: "[I]t therefore seems. . .that in light of *Teamsters*, the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Id.*

The Court then reasoned that the conclusion in *Teamsters* "that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind §706(g) of Title VII, *which affects the remedies available in Title VII litigation.*" *Id.* at 2588–89 (emphasis added).[9]

The Court continued:

> That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates. Opponents of the legislation that became Title VII charged that if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially-balanced work force even though those persons had not been victims of illegal discrimination. Responding to these charges, Senator Humphrey explained the limits on a court's remedial powers as follows:
>
> > "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as §706(g)]. . . .Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require. . .firing. . .of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but is nonexistent." 110 Cong. Rec. 6549 (remarks of Sen. Humphrey).
>
> An interpretative memorandum of the bill entered into the Congressional Record by Senators Clark and Case likewise made clear that a court was not authorized to give preferential treatment to non-victims. "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g)]. . . ." *Id.*, at 7214.
>
> Similar assurances concerning the limits on a court's authority to award make-whole relief were provided by supporters of the bill throughout the legislative process. For

[8] Indeed, the Court noted:

> Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a non-minority employee laid off to make room for him. He may have to wait until a vacancy occurs, and if there are non-minority employees on layoff, the Court must balance the equities in determining who is entitled to the job.

Id. at 2588 (citations omitted). The Court noted that "[l]ower courts have uniformly held that relief [even] for actual victims does not extend to bumping employees previously occupying jobs." *Id.* at 2588 n.11.

[9] Section 706(g) *(see* note 4) is that part of Title VII which provides a court with authority to remedy violations of Title VII, either by consent decree or by a judgment entered after trial. As such, it provides the basis for a court's authority to provide relief in hiring and promotions, as well as in other aspects of employment. The last sentence of section 706(g) has served as the basis for the argument that a court may provide relief only to actual victims of an employer's discrimination.

example, following passage of the bill in the House, its Republican House sponsors published a memorandum describing the bill. Referring to the remedial powers given the courts by the bill, the memorandum stated: "Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. *But Title VII does not permit the ordering of racial quotas in business or unions* . . ." *Id.*, at 6566 (emphasis added [by the Court]). In like manner, the principal Senate sponsors, in a bi-partisan news letter delivered during an attempted filibuster to each senator supporting the bill, explained that "[u]nder title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." *Id.*, at 14465.

Id. at 2589–90 (footnotes omitted).

The Court also relied on the legislative history of the 1972 amendments to Title VII, as well as its rulings in *Teamsters* and *Franks* v. *Bowman Transportation Co.*,[10] in concluding that judicial relief under Title VII can be accorded only to actual victims of the employer's discrimination.

The Court then quickly rejected the court of appeals' third rationale, that the district court did "no more than that which the City unilaterally could have done by way of adopting an affirmative action program." *Id.* at 2590. Explicitly declining to decide whether "a public employer. . .could have taken this course without violating the law," the Court said that the city took no such course and actually objected to the modification. Accordingly, that issue was not before the Court. *Id.*[11]

The Court also rejected the argument that the consent decree was properly "modified pursuant to the district court's equity jurisdiction" under an earlier decision of the Court, *United States* v. *Swift & Co.*[12] The Court stated: "But *Swift* cannot be read as authorizing a court to impose a modification of a decree that runs counter to statutory policy, . . .here §§703(h) [the seniority provision] *and 706(g)* [providing the basis of a court's remedial authority] of Title VII." *Id.* at 2590 n.17 (emphasis added).

Justice O'Connor's Concurring Opinion

Justice O'Connor, who joined the majority's opinion, concurred "in the Court's treatment of these difficult issues," and wished to state her "understanding of what the Court holds today." *Id.* at 2591 (O'Connor, J., concurring).

She agreed with the Court that the case was not moot because a controversy continued that could not be resolved merely by vacating a preliminary injunction. As a result of the injunction, she wrote, some black firefighters had obtained added seniority and the increased job opportunities such higher seniority entails. If the city does not vigorously defend the preexisting seniority system, "it will have to cope with deterioration in employee morale, labor unrest, and reduced productivity." *Id.* Because these and other "collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot." *Id.* (footnote omitted).

Turning to the merits of the case, Justice O'Connor viewed the place of this case in the history of the parties' litigation as dictating the Court's result. Although the city was a party to both an agreement with the union and the consent decree, the respondents neither sought the union's participation in the negotiations of their decree with the city, nor included the seniority system as a subject of the negotiations, and waived all rights to seek further relief. When the layoffs occurred, the district court ruled that the seniority system had not been adopted or applied with discriminatory intent, holding instead that modification of the decree was appropriate because of the system's discriminatory effects. Justice O'Connor observed that, had the respondents presented a plausible case of discriminatory intent in the adoption or application of the seniority system, the Court would have been "hard pressed" to decide that the preliminary injunction was an abuse of discretion. *Id.* at 2592. But the lower courts rejected the claim that the seniority system reflected intentional discrimination. A showing that the seniority system had a disproportionate effect would have been insufficient to sustain the preliminary injunction because Title VII "affirmatively protects bona fide seniority systems, including those with discriminatory effects on minorities." *Id.*

[10] 427 U.S. 947 (1976).

[11] This issue raises the constitutional question of whether, under the equal protection clause of the 14th amendment, a government employer may voluntarily prefer non-victims of its discrimination at the expense of innocent third parties on the basis of race. That issue was present in Bratton v. City of Detroit, which the Court declined to hear earlier in 1984.

[12] 286 U.S. 106, 114–15 (1932).

Adopting the reasoning of the Court and Justice Stevens that the consent decree itself could not be fairly interpreted to support the injunction, Justice O'Connor then stated that a district court cannot:

> unilaterally modify a consent decree to adjust racial imbalances or to provide retroactive relief that abrogates legitimate expectations of other employees and applicants. . . .A court may not grant preferential treatment to any individual or group simply because the group to which they belong is adversely affected by a bona fide seniority system. Rather, a court may use its remedial powers, including its power to modify a consent decree, only to prevent future violations and to compensate identified victims of unlawful discrimination.

Id. at 2593 (citations omitted).[13]

Justice O'Connor found "persuasive the Court's reasons for holding Title VII relevant to analysis of the modification issue. . .and the Court's application of Title VII's provisions to the facts of the present controversy." *Id.* at 2593 n.2. Justice O'Connor explained that the respondents in 1980 could have gone to trial, established discrimination in the department's past hiring practices, identified the victims, and "possibly" obtained limited forms of retroactive seniority. Alternatively, in negotiating the decree, they could have sought the participation of the union, identified specific victims, and obtained limited retroactive relief. Because the respondents did none of these things and "waived their right to seek further relief," to allow them "to obtain relief properly reserved for only identified victims or to prove their victim status now would undermine the certainty of obligation that is condition precedent to employers' acceptance of, and unions' consent to, employment discrimination settlements." *Id.* at 2593. She found that modifications requiring maintenance of racial balance not only would discourage valid settlements of employment discrimination cases, but also would operate to impede them. "Thus, when the Court states that this preferential relief could not have been awarded even had *this case* gone to trial,. . .it is holding respondents to the bargain they struck during the consent decree negotiations in 1980 and thereby furthering the statutory policy of voluntary settlement." *Id.* at 2594 (emphasis in original). Justice O'Connor's conclusion was "[t]hat the District Court had no authority to order the [Fire] Department to maintain its current racial balance or to provide preferential treatment to blacks." *Id.*

Justice Stevens' Concurring Opinion

Justice Stevens found that the case was not moot because the district court's preliminary injunction remained reviewable due to its continuing effect on the city's personnel policies. Justice Stevens concluded that the likelihood that the city would have to have another layoff was not so remote as to give it no stake in the outcome of the litigation. *Id.* at 2594. (Stevens, J., concurring in the judgment).

With respect to the Court's discussion of Title VII, Justice Stevens stated that it was "wholly advisory." In his judgment, the case involved no Title VII issues, only the administration of a consent decree. If the consent decree justified the district court's preliminary injunction, he wrote, the injunction should have been upheld "irrespective of whether Title VII would authorize a similar injunction." *Id.*[14]

Justice Stevens concluded that the injunction was invalid as a matter of construction of the consent decree: "There is simply nothing in the record to justify the conclusion that the injunction was based on a reasoned construction of the consent decree." *Id.* at 2595. He also rejected the argument that "changed circumstances" justified the injunction as a modification of the decree. Circumstances had not changed; when the decree was entered, "it was apparent that any future seniority-based layoffs would have an adverse effect on blacks." *Id.*

Justice Blackmun's Dissenting Opinion

Justice Blackmun, joined by Justices Brennan and Marshall, dissented, arguing that the case was moot, that the Court applied an incorrect standard in reviewing the case, and that both the consent decree and Title VII permit the relief ordered by the district court.

Mootness

Justice Blackmun stated that because all laid-off workers had been rehired, the case, although "live" at

[13] Indeed, "[e]ven when its remedial powers are properly invoked, a district court may award preferential treatment only after carefully balancing the competing interests of discriminatees, innocent employees, and the employer. In short, no matter how significant the change in circumstance, a district court cannot unilaterally modify a consent decree to adjust racial balances in the way the District Court did here." *Id.* at 2593 (citations omitted).

[14] Justice Stevens shared Justice Blackmun's "doubts" that in Title VII litigation "a consent decree cannot authorize anything that would not constitute permissible relief under Title VII." Sections 703(h) and 706(g), he stated, "do not place any limitations on what the parties can agree to in a consent decree." *Id.* at 2594–95 n.3. The majority opinion explicitly rejected this view. *Id.* at 2587 n.9.

its start, had become moot, rendering the Court's opinion "wholly advisory." *Id.* at 2596 (Blackmun, J., dissenting). When a court declares a case moot, it vacates the judgment and reinstates the legal relationship of the parties existing prior to the beginning of the lawsuit. Such an action here, Justice Blackmun asserted, would allow the parties to start fresh should future layoffs become necessary.

Justice Blackmun rejected the Court's statement that "even if the preliminary injunction applies only to the 1981 layoffs, the 'rulings' that formed the 'predicate' for the preliminary injunction 'remain undisturbed.'" *Id.* at 2597. Justice Blackmun stated that vacating the judgment "would also vacate whatever 'rulings' formed the 'predicate' for that judgment," since there is no "'ruling' that has a life independent of the judgment." *Id.* Justice Blackmun found "equally remarkable" the Court's "notion" that the case is not moot because the respondents still defend the district court's ruling. A party need not concede that his case lacks merit in order to argue mootness, he pointed out. With respect to the Court's conclusion that the lost wages and seniority of the white employees keep the controversy justiciable, Justice Blackmun argued that the city's ability to make these employees whole is unaffected by the preliminary injunction and that even "the Court concedes that there is doubt whether, in fact, the union possesses any enforceable contractual rights" against the city. *Id.* at 2599.[15]

Proper Standard of Review

Justice Blackmun asserted that the Court also ignored the proper standard of review—whether the district court abused its discretion—by incorrectly treating the preliminary injunction as if it were a permanent injunction on the merits of the case.[16] "After taking jurisdiction over a controversy that no longer exist[ed], the Court review[ed] a decision that was never made." *Id.* at 2600.

Statement of the Issue

Moreover, the Court misstated the issue in the case when it focused on "the District Court's power to 'ente[r] an injunction requiring white employees to be laid off.'" *Id.* at 2602. The preliminary injunction neither required the city to lay off any employees nor abrogated the contractual rights of any white employees. Properly stated, the dissent contended, the issue is the district court's authority "to enjoin a layoff of more than a certain number of blacks." *Id.*

District Court's Authority

Interpretation of the Consent Decree

Construing the terms of the consent decree essentially as a contract, Justice Blackmun indicated that the district court had authority to enforce the consent decree pursuant to a paragraph in the decree providing that "[t]he Court retains jurisdiction of this action for such further orders as may be necesssary or appropriate to effectuate the purposes of this decree." The decree also contained a provision requiring "reasonable, good faith efforts" to meet the decree's hiring and promotion goals. *Id.* at 2603. By treating the district court's preliminary injunction as a permanent one, however, Justice Blackmun argued, the Court first deprived the respondents of the opportunity to build a factual record demonstrating that the proposed layoffs violated the decree and then faulted them for having failed to do so. *Id.* If the trial court had determined that the layoffs would "frustrate" the purposes of the consent decree, "then the decree empowered the District Court to enter an appropriate order." *Id.* at 2604.

Authority to Modify a Consent Decree

Disagreeing with the Court's position on the inherent power of the district court to modify the decree, the dissenters, citing an earlier Court decision, noted that a Federal trial court, as a court of equity, has inherent power "to modify an injunction in adaptation to changed conditions. . . ." *Id.* The dissent charged the Court with overlooking an important distinction between "individual relief" and "race-conscious class relief" under section 706(g) of Title VII. *Id.* at 2605. Justice Blackmun, citing decisions by virtually every Federal appellate court, stated that in addition to "make whole" relief, which is available only if the plaintiff can show individual discrimination, the courts of appeals have unanimously held that race-conscious affirmative remedies are also appropriate under section 706(g). *Id.* at 2606 and n.10. The dissent

[15] Justice Blackmun also noted that the Court's decision in this case would not provide the affected employees with either backpay or seniority because both the city and the union were petitioners, not adversaries. *Id.* at 2598.

[16] Preliminary injunctions are issued before a full factual record has been completed and usually in considerable haste. Consequently, reviewing courts, Justice Blackmun argued, should not equate the rulings in these circumstances with a ruling on the merits after a trial.

stated that "[t]he purpose of such [race-conscious] relief is not to make whole any particular individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future." *Id.* at 2606. Further, "[b]ecause these cases arise out of a consent decree, . . .it is. . .impossible for the Court to know the extent and nature of any past discrimination by the city." *Id.*

According to Justice Blackmun, the Court's reliance on *Teamsters* was erroneous. Justice Blackmun explained that only individual claims for relief were before the Court in *Teamsters* because earlier in the litigation the parties had negotiated a consent decree with race-conscious provisions settling all classwide claims; the layoffs in *Stotts,* however, exclusively concerned classwide, race-conscious relief. *Id.* at 2608.[17] *Teamsters,* he said, did not address "the nature of appropriate affirmative class relief that would have been available had such relief not been provided in the consent decree between the parties." *Id.*

Although he acknowledged that "many in Congress [in 1964] opposed. . .race-conscious remedies," Justice Blackmun contended that:

> there is [legislative] authority that supports a narrower interpretation of §706(g). Under that interpretation, the last sentence of §706(g) addresses only the situation in which a plaintiff demonstrates that an employer has engaged in unlawful discrimination, but the employer can show that a particular individual would not have received the job, promotion or reinstatment even in the absence of discrimination because there was also a lawful justification for the action.

Id. Moreover, in 1972 Congress specifically added to section 706(g) a phrase permitting "any other equitable relief as the court deems appropriate," and the Senate specifically rejected an amendment intended to prohibit employment goals and quotas.[18]

Noting that Justice White and three other Justices had joined in an opinion in *University of California Regents* v. *Bakke,*[19] which stated that Title VII does not bar the remedial use of race, and that the unanimous view of the courts of appeals was that Title VII does not prohibit race-conscious remedies, Justice Blackmun stated his view of the scope of the Court's decision:

> Because the Court's opinion does not even acknowledge this consensus, it seems clear that the Court's conclusion that the District Court "ignored the policy" of §706(g) is a statement that the race-conscious relief ordered in these cases was broader than necessary, not that race-conscious relief is never appropriate under Title VII.

Id. at 2610.

[17] Justice Blackmun added that "[a]ny suggestion that a consent decree can provide relief only if a defendant concedes liability would drastically reduce. . .the incentives for entering into consent decrees," thus discouraging the kind of voluntary settlement of Title VII cases the Court had earlier said Congress wished to achieve. *Id.* at 2607.

[18] The majority opinion addressed the argument that the 1972 amendments to Title VII permit race-conscious remedies and came to the opposite conclusion. *Id.* at 2590 n.15.

[19] 438 U.S. 265, 353 n.28 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

Stotts Opinion

FIREFIGHTERS LOCAL UNION NO. 1784, Petitioner,

v.

Carl W. STOTTS et al.

MEMPHIS FIRE DEPARTMENT et al., Petitioners,

v.

Carl W. STOTTS, etc., et al.

No. 82-206.

Argued Dec. 6, 1983.

Decided June 12, 1984 *

After consent decrees had been entered in equal employment opportunity case against city, worker moved to restrain city from implementing layoff proposal in manner affecting minority firemen. The United States District Court for the Western District of Tennessee modified the decrees and enjoined proposed layoffs and demotions of minority firemen. The Court of Appeals, Sixth Circuit, affirmed, 679 F.2d 541. City and union filed petitions for certiorari, which were granted, and the

* Together with No. 82-229, *Memphis Fire Department et al. v. Stotts et al.*, also on certiorari to the same court.

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cases were consolidated for oral argument. The Supreme Court, Justice White, held that: (1) the cases were not moot; (2) the District Court exceeded its powers in entering an injunction requiring white employees to be laid off when an otherwise applicable seniority system would have called for the layoff of black employees with less seniority; and (3) the District Court's order could not be justified as enforcing terms of the agreed-upon consent decree, as carrying out the purposes of the decree, as being within inherent authority to modify the decree, as being consistent with strong policy favoring voluntary settlement of Title VII actions, as being within the court's authority to award make-whole relief or as a valid Title VII remedial order.

Judgment of the Court of Appeals reversed.

Justice O'Connor filed concurring opinion.

Justice Stevens filed opinion concurring on the judgment.

Justice Blackmun dissented and filed opinion in which Justice Brennan and Justice Marshall joined.

1. Federal Courts ⇐460

Where it appeared from its terms that injunction was still in force and that, unless set aside, compliance would be required in the future, and where, in any event, mandated modification of consent decree continued its impact on parties in that, unless overturned, court rulings would remain in effect and would require city to obey modified consent decree and to disregard its seniority agreement in making future layoffs of employees, case was not moot as against contention that all white employees laid off as result of injunction had been restored to duty only one month after layoff and those who had been demoted had since been offered back their old positions.

2. Federal Courts ⇐460

Where unless judgment of Court of Appeals was reversed, laid off or "bumped down" employees would have back pay claims, judgment would have continuing effect on city's management of its fire department, and case was not moot despite contention that all white employees laid off as result of injunction had been restored to duty and that those demoted had been offered back their old positions.

3. Federal Courts ⇐460

As long as parties have concrete interest in outcome of litigation, case is not moot, notwithstanding size of dispute, and amount of money and seniority at stake did not determine mootness though not much money or seniority were involved.

4. Federal Courts ⇐460

Respondents could not invoke jurisdiction of federal court to obtain favorable modification of consent decree and then insulate that ruling from appellate review by claiming that they were no longer interested in the matter, particularly when modification continued to have adverse effects on the other parties to the action.

5. Federal Civil Procedure ⇐2397

Scope of consent decree must be discerned within its four corners, not by reference to what might satisfy purposes of one of the parties to it or by what might have been written had party established his factual claims and legal theories in litigation.

6. Federal Civil Procedure ⇐2397

Express terms of consent decree could not be construed as contemplating that injunction would be entered to preclude city, as employer of firemen, from following seniority system adopted by the city and union.

7. Civil Rights ⇐46(7)
Federal Civil Procedure ⇐2397

It was reasonable to believe that "remedy" which it was purpose of consent decree to provide would not exceed bounds of remedies appropriate under Title VII, at least in absence of some express provision to that effect, and city no doubt considered its seniority system to be valid and had no intention of departing from it when it

agreed to consent decree, and thus injunction precluding city as employer from following seniority system adopted by city and union was not justifiable as merely enforcing agreement of the parties as reflected in prior consent decree. Civil Rights Act of 1964, §§ 701 et seq., 703(h), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e–2(h).

8. Federal Civil Procedure ⇐2397

District court's authority to impose modification of decree was not wholly dependent on decree, and Title VII necessarily acted as limit on the district court's authority to modify decree over objections of employer, issue being not subject to resolution solely by reference to terms of consent decree and notions of equity. Civil Rights Act of 1964, §§ 701 et seq., 703(h), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e–2(h).

9. Civil Rights ⇐9.12

Title VII provision that it is not unlawful employment practice to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to bona fide seniority system provided that such differences are not result of intention to discriminate because of race permits routine application of seniority system, absent proof of intention to discriminate. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e–2(h).

10. Federal Civil Procedure ⇐2397

"Settlement theory" as support for injunction assertedly based upon consent decree or modification thereof had no application where there was no "settlement" with respect to disputed issue.

11. Civil Rights ⇐46(7)

If individual members of plaintiff class demonstrate that they have been actual victims of discriminatory employment practice, they may be awarded competitive seniority, but mere membership in disadvantaged class is insufficient and each individual must prove that the discriminatory practice had impact on him, and even if he shows such impact, he is not automatically entitled to have nonminority employee laid off to make room for him, but he may have to wait until vacancy occurs, and if there are nonminority employees on layoff, court must balance equities in determining who is entitled to the job. Civil Rights Act of 1964, §§ 701 et seq., 703(h), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e–2(h).

12. Civil Rights ⇐46(7)

Judicial precedent that court can award competitive seniority only when beneficiary of award has actually been victim of illegal discrimination is consistent with policy behind Title VII provision affecting remedies available in Title VII litigation, which policy is to provide make-whole relief only to those who have been actual victims of illegal discrimination. Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C.A. § 2000e–5(g).

13. Civil Rights ⇐46(2)

Court in Title VII case is not authorized to give preferential treatment to nonvictims. Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C.A. § 2000e–5(g).

14. Civil Rights ⇐46(2)

The 1972 amendments of Title VII evidence emphatic confirmation that federal courts are empowered to fashion such relief as particular circumstances of case may require to effect restitution, making whole insofar as possible "the victims of racial discrimination." Civil Rights Act of 1964, §§ 703(h), 706(g), as amended, 42 U.S.C.A. §§ 2000e–2(h), 2000e–5(g); 42 U.S.C.A. §§ 1981, 1983.

15. Civil Rights ⇐46(7)

Injunctive order precluding city as employer from following seniority policy mandated by seniority system adopted by city and union was in conflict with policy behind Title VII provision for relief to be ordered by the court. Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C.A. § 2000e–5(g); 42 U.S.C.A. §§ 1981, 1983.

16. Civil Rights ⇐13.4(6)

Under statute providing for the equal rights of all citizens and 1871 civil rights statute, relief is authorized only when there is proof or admission of intentional discrimination. 42 U.S.C.A. §§ 1981, 1983.

17. Civil Rights ⇐46(3)

That city as employer could have done, by way of adopting affirmative action program, what district court ordered city to do was insufficient to justify the district court's order. Civil Rights Act of 1964, §§ 703(h), 706(g), as amended, 42 U.S.C.A. §§ 2000e–2(h), 2000e–5(g).

18. Federal Civil Procedure ⇐2643

Court is not authorized pursuant to its equity jurisdiction to impose modification of decree counter to statutory policy. Civil Rights Act of 1964, §§ 703(h), 706(g), as amended, 42 U.S.C.A. §§ 2000e–2(h), 2000e–5(g).

Syllabus **

Respondent Stotts, a black member of petitioner Memphis, Tenn., Fire Department, filed a class action in Federal District Court charging that the Department and certain city officials were engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of, *inter alia*, Title VII of the Civil Rights Act of 1964. This action was consolidated with an action filed by respondent Jones, also a black member of the Department, who claimed that he had been denied a promotion because of his race. Thereafter, a consent decree was entered with the stated purpose of remedying the Department's hiring and promotion practices with respect to blacks. Subsequently, when the city announced that projected budget deficits required a reduction of city employees, the District Court entered an order preliminarily enjoining the Department from following its seniority system in determining who would be laid off as a result of the budgetary shortfall, since the proposed layoffs would have a racially discriminatory effect and the seniority system was not a bona fide one. A modified layoff plan, aimed at protecting black employees so as to comply with the court's order, was then presented and approved, and layoffs pursuant to this plan were carried out. This resulted in white employees with more seniority than black employees being laid off when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority. The Court of Appeals affirmed, holding that although the District Court was wrong in holding that the seniority system was not bona fide, it had acted properly in modifying the consent decree.

Held:

1. These cases are not rendered moot by the facts that the preliminary injunction purportedly applied only to 1981 layoffs, that all white employees laid off as a result of the injunction were restored to duty only one month after their layoff, and that others who were demoted have been offered back their old positions. First, the injunction is still in force and unless set aside must be complied with in connection with any future layoffs. Second, even if the injunction applied only to the 1981 layoffs, the predicate for it was the ruling that the consent decree must be modified to provide that the layoffs were not to reduce the percentage of black employees, and the lower courts' rulings that the seniority system must be disregarded for the purpose of achieving the mandated result remain undisturbed. Accordingly, the inquiry is not merely whether the injunction is still in effect, but whether the mandated modification of the consent decree continues to have an impact on the parties such that the cases remain alive. Respondents have failed to convince this Court that the modification and the *pro tanto* invalidation of the seniority system are of no real concern to the city because it will never again con-

** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

template layoffs that if carried out in accordance with the seniority system would violate the modified decree. Finally, the judgment below will have a continuing effect on management of the Fire Department with respect to making whole the white employees who were laid off and thereby lost a month's pay and seniority, or who were demoted and thereby may have backpay claims. Unless that judgment is reversed, the layoffs and demotions were in accordance with the law. The fact that not much money and seniority are involved does not determine mootness. Pp. 2583–2585.

2. The District Court's preliminary injunction cannot be justified either as a effort to enforce the consent decree or as a valid modification thereof. Pp. 2585–2590.

(a) The injunction does not merely enforce the agreement of the parties as reflected in the consent decree. The scope of a consent decree must be discerned within its four corners. Here, the consent decree makes no mention of layoffs or demotions nor is there any suggestion of an intention to depart from the existing seniority system or from the Department's arrangement with the union. It therefore cannot be said that the decree's express terms contemplated that such an injunction would be entered. Nor is the injunction proper as carrying out the stated purpose of the decree. The remedy outlined in the decree did not include the displacement of white employees with seniority over blacks and cannot reasonably be construed to exceed the bounds of remedies that are appropriate under Title VII. Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern-or-practice suit such as this. Moreover, since neither the union nor the white employees were parties to the suit when the consent decree was entered, the entry of such decree cannot be said to indicate any agreement by them to any of its terms. Pp. 2586–2587.

(b) The theory that the strong policy favoring voluntary settlement of Title VII actions permits consent decrees that encroach on seniority systems does not justify the preliminary injunction as a legitimate modification of the consent decree. That theory has no application when there is no "settlement" with respect to the disputed issue, such as here where the consent decree neither awarded competitive seniority to the minority employees nor purported to depart from the existing seniority system. Nor can the injunction be so justified on the basis that if the allegations in the complaint had been proved, the District Court could have entered an order overriding the seniority provisions. This approach overstates a trial court's authority to disregard a seniority system in fashioning a remedy after a plaintiff has proved that an employer has followed a pattern or practice having a discriminatory effect on black employees. Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination nor any award of competitive seniority to any of them. The Court of Appeals' holding that the District Court's order modifying the consent decree was permissible as a valid Title VII remedial order ignores not only the ruling in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination, but also the policy behind § 706(g) of Title VII of providing make-whole relief only to such victims. And there is no merit to the argument that the District Court ordered no more than that which the city could have done by way of adopting an affirmative-action program, since the city took no such action and the modification of the decree was imposed over its objection. Pp. 2587–2590.

679 F.2d 541, reversed.

Allen S. Blair, Memphis, Tenn., for petitioners.

Sol. Gen. Rex E. Lee, Washington, D.C., for the U.S. as amicus curiae, by special leave of Court.

Richard B. Fields, Memphis, Tenn., for respondents.

Justice WHITE delivered the opinion of the Court.

Petitioners challenge the Court of Appeals' approval of an order enjoining the City of Memphis from following its seniority system in determining who must be laid off as a result of a budgetary shortfall. Respondents contend that the injunction was necessary to effectuate the terms of a Title VII consent decree in which the City agreed to undertake certain obligations in order to remedy past hiring and promotional practices. Because we conclude that the order cannot be justified, either as an effort to enforce the consent decree or as a valid modification, we reverse.

I

In 1977 respondent Carl Stotts, a black holding the position of fire-fighting captain in the Memphis, Tennessee, Fire Department, filed a class action complaint in the United States District Court for the Western District of Tennessee. The complaint charged that the Memphis Fire Department and other city officials were engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as 42 U.S.C. §§ 1981 and 1983. The District Court certified the case as a class action and consolidated it with an individual action subsequently filed by respondent Fred Jones, a black fire-fighting private in the Department, who claimed that he had been denied a promotion because of his race. Discovery proceeded, settlement negotiations ensued, and in due course, a consent decree was approved and entered by the District Court on April 25, 1980.

The stated purpose of the decree was to remedy the hiring and promotion practices "of the Department with respect to blacks." 679 F.2d 541, 575–576 (CA6 1982) (Appendix). Accordingly, the City agreed to promote 13 named individuals and to provide backpay to 81 employees of the Fire Department. It also adopted the long-term goal of increasing the proportion of minority representation in each job classification in the Fire Department to approximately the proportion of blacks in the labor force in Shelby County, Tennessee. However, the City did not, by agreeing to the decree, admit "any violations of law, rule or regulation with respect to the allegations" in the complaint. *Id.*, at 574. The plaintiffs waived any further relief save to enforce the decree, *ibid.*, and the District Court retained jurisdiction "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." *Id.*, at 578.

The long-term hiring goal outlined in the decree paralleled the provisions of a 1974 consent decree, which settled a case brought against the City by the United States and which applied citywide. Like the 1974 decree, the 1980 decree also established an interim hiring goal of filling on an annual basis 50 percent of the job vacancies in the Department with qualified black applicants. The 1980 decree contained an additional goal with respect to promotions: the Department was to attempt to ensure that 20 percent of the promotions in each job classification be given to blacks. Neither decree contained provisions for layoffs or reductions in rank, and neither awarded any competitive seniority. The 1974 decree did require that for purposes of promotion, transfer, and assignment, seniority was to be computed "as the total seniority of that person with the City." *Id.*, at 572.

In early May, 1981, the City announced that projected budget deficits required a reduction of non-essential personnel throughout the City Government. Layoffs were to be based on the "last hired, first fired" rule under which city-wide seniority, determined by each employee's length of continuous service from the latest date of permanent employment, was the basis for

deciding who would be laid off. If a senior employee's position were abolished or eliminated, the employee could "bump down" to a lower ranking position rather than be laid off. As the Court of Appeals later noted, this layoff policy was adopted pursuant to the seniority system "mentioned in the 1974 decree and ... incorporated in the City's memorandum with the Union." 679 F.2d, at 549.

On May 4, at respondents' request, the District Court entered a temporary restraining order forbidding the layoff of any black employee. The Union, which previously had not been a party to either of these cases, was permitted to intervene. At the preliminary injunction hearing, it appeared that 55 then-filled positions in the Department were to be eliminated and that 39 of these positions were filled with employees having "bumping" rights. It was estimated that 40 least-senior employees in the fire-fighting bureau of the Department [1] would be laid off and that of these 25 were white and 15 black. It also appeared that 56 percent of the employees hired in the Department since 1974 had been black and that the percentage of black employees had increased from approximately 3 or 4 percent in 1974 to 11½ percent in 1980.

On May 18, the District Court entered an order granting an injunction. The Court found that the consent decree "did not contemplate the method to be used for reduction in rank or lay-off," and that the layoff policy was in accordance with the City's seniority system and was not adopted with any intent to discriminate. Nonetheless, concluding that the proposed layoffs would have a racially discriminatory effect and that the seniority system was not a bona fide one, the District Court ordered that the City "not apply the seniority policy insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed...." On June 23, the District Court broadened its order to include three additional classifications. A modified layoff plan, aimed at protecting black employees in the seven classifications so as to comply with the court's order, was presented and approved. Layoffs pursuant to the modified plan were then carried out. In certain instances, to comply with the injunction, non-minority employees with more seniority than minority employees were laid off or demoted in rank.[2]

On appeal, the Court of Appeals for the Sixth Circuit affirmed despite its conclusion that the District Court was wrong in holding that the City's seniority system was not bona fide. 679 F.2d, at 551, n. 6. Characterizing the principal issue as "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs," *id.*, at 551, the Court of Appeals concluded that the District Court had acted properly. After determining that the decree was properly approved in the first instance, the court held that the modification was permissible under general contract principles because the City "contracted" to provide "a substantial increase in the number of minorities in supervisory positions" and the layoffs would breach that contract. *Id.*, at 561. Alternatively, the court held that the District Court was authorized to modify the decree because new and unforeseen circumstances had created a hardship for one of the parties to the decree. *Id.*, at 562–563. Finally, articulating three alternative rationales, the court rejected petitioners' argument that the modification was improper

1. The Memphis Fire Department is divided into several bureaus, including fire-fighting, alarm office, administration, apparatus, maintenance, and fire prevention. Of the positions covered by the original injunction, all but one were in the fire-fighting bureau.

2. The City ultimately laid off 24 privates, three of whom were black. Had the seniority system been followed, six blacks would have been among the 24 privates laid off. Thus, three white employees were laid off as a direct result of the District Court's order. The number of whites demoted as a result of the order is not clear from the record before us.

because it conflicted with the City's seniority system, which was immunized from Title VII attack under § 703(h) of that Act, 42 U.S.C. § 2000e–2(h).

The City and the Union filed separate petitions for certiorari. The two petitions were granted, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1331 (1983), and the cases were consolidated for oral argument.

II

[1] We deal first with the claim that these cases are moot. Respondents submit that the injunction entered in this case was a preliminary injunction dealing only with the 1981 layoffs, that all white employees laid off as a result of the injunction were restored to duty only one month after their layoff, and that those who were demoted have now been offered back their old positions. Assertedly, the injunction no longer has force or effect, and the cases are therefore moot. For several reasons, we find the submission untenable.

First, the injunction on its face ordered "that the defendants not apply the seniority policy proposed insofar as it will decrease the percentage of black" employees in specified classifications in the Department. The seniority policy was the policy adopted by the City and contained in the collective bargaining contract with the Union. The injunction was affirmed by the Court of Appeals and has never been vacated. It would appear from its terms that the injunction is still in force and that unless set aside must be complied with in connection with any future layoffs.

Second, even if the injunction itself applied only to the 1981 layoffs, the predicate for the so-called preliminary injunction was the ruling that the consent decree must be construed to mean and, in any event, must be modified to provide that layoffs were not to reduce the percentage of blacks employed in the fire department. Furthermore, both the District Court and the Court of Appeals, for different reasons, held that the seniority provisions of the City's collective bargaining contract must be disregarded for the purpose of achieving the mandated result. These rulings remain undisturbed, and we see no indication that respondents concede in urging mootness that these rulings were in error and should be reversed. To the contrary, they continue to defend them. Unless overturned, these rulings would require the City to obey the modified consent decree and to disregard its seniority agreement in making future layoffs.

Accordingly, the inquiry is not merely whether the injunction is still in effect, but whether the mandated modification of the consent decree continues to have an impact on the parties such that the case remains alive.[3] We are quite unconvinced—and it is the respondents' burden to convince us, *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979)—that the modification of the decree and the *pro tanto* invalidation of the seniority system is of no real concern to the City because it will never again contemplate layoffs that if carried out in accordance with the seniority system would violate the modified decree.[4] For this reason alone, the case is not moot.

3. The Court of Appeals, recognizing that the District Court had done more than temporarily preclude the City from applying its seniority system, stated that the "principal issue" before it was "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs." 679 F.2d, at 551.

4. Of course if layoffs become necessary, both the City and respondents will be affected by the modified decree, the City because it will be unable to apply its seniority system, respondents because they will be given greater protection than they would otherwise receive under that system. Moreover, the City will be immediately affected by the modification even though no layoff is currently pending. If the lower courts' ruling is left intact, the City will no longer be able to promise current or future employees that layoffs will be conducted solely on the basis of seniority. Against its will, the City has been deprived of the power to offer its employees one of the benefits that make employment with the City attractive to many workers. Seniority has traditionally been, and con-

[2] Third, the judgment below will have a continuing effect on the City's management of the Department in still another way. Although the City has restored or offered to restore to their former positions all white employees who were laid off or demoted, those employees have not been made whole: those who were laid off have lost a month's pay, as well as seniority that has not been restored; and those employees who "bumped down" and accepted lesser positions will also have back-pay claims if their demotions were unjustified. Unless the judgment of the Court of Appeals is reversed, however, the layoffs and demotions were in accordance with the law, and it would be quite unreasonable to expect the City to pay out money to which the employees had no legal right. Nor would it feel free to respond to the seniority claims of the three white employees who, as the City points out, lost competitive seniority in relation to all other individuals who were not laid off, including those minority employees who would have been laid off but for the injunction.[5] On the other hand, if the Court of Appeals' judgment is reversed, the City would be free to take a wholly different position with respect to backpay and seniority.

[3] Undoubtedly, not much money and seniority are involved, but the amount of money and seniority at stake does not determine mootness. As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. *Powell v. McCormack*, 395 U.S. 486, 496–498, 89 S.Ct. 1944, 1950–1951, 23 L.Ed.2d 491 (1969). Moreover, a month's pay is not a negligible item for those affected by the injunction, and the loss of a month's competitive seniority may later determine who gets a promotion, who is entitled to bid for transfers or who is first laid off if there is another reduction in force. These are matters of substance, it seems to us, and enough so to foreclose any claim of mootness. Cf. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 756, 96 S.Ct. 1251, 1260, 47 L.Ed.2d 444 (1976); *Powell v. McCormack*, *supra*, 395 U.S., at 496–498, 89 S.Ct., at 1950–1951; *Bond v. Floyd*, 385 U.S. 116, 128, n. 4, 87 S.Ct. 339, 345, n. 4, 17 L.Ed.2d 235 (1966).

[4] In short, respondents successfully attacked the City's initial layoff plan and secured a judgment modifying the consent decree, ordering the City to disregard its seniority policy, and enjoining any layoffs that would reduce the percentage of blacks in the Department. Respondents continue to defend those rulings, which, as we have said, may determine the City's disposition of back pay claims and claims for restoration of competitive seniority that will affect

tinues to be, a matter of great concern to American workers. "[M]ore than any other provision of the collective [bargaining] agreement ... seniority affects the economic security of the individual employee covered by its terms." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766, 96 S.Ct. 1251, 1265, 47 L.Ed.2d 444 (1976) (quoting Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L.Rev. 1532, 1535 (1962)). It is not idle speculation to suppose that the City will be required to offer greater monetary compensation or fringe benefits in order to attract and retain the same caliber and number of workers as it could without offering such benefits were it completely free to implement its seniority system. The extent to which the City's employment efforts will be harmed by the loss of this "bargaining chip" may be difficult to measure, but in view of the importance that American workers have traditionally placed on such benefits, the harm cannot be said to be insignificant. Certainly, an employer's bargaining position is as substantially affected by a decree precluding it from offering its employees the benefits of a seniority system as it is by a state statute that provides economic benefits to striking employees. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122–125, 94 S.Ct. 1694, 1698–1699, 40 L.Ed.2d 1 (1974).

5. Since the District Court's order precludes the City from reducing the percentage of black employees holding particular jobs in the event of a layoff or reduction in rank and since competitive seniority is the basis for determining who will be laid off or bumped down, there is some question whether, in light of the judgment below, the City could legally restore to the laid-off employees the competitive seniority they had before the layoffs without violating the order.

respondents themselves. It is thus unrealistic to claim that there is no longer a dispute between the City and respondents with respect to the scope of the consent decree. Respondents cannot invoke the jurisdiction of a federal court to obtain a favorable modification of a consent decree and then insulate that ruling from appellate review by claiming that they are no longer interested in the matter, particularly when the modification continues to have adverse effects on the other parties to the action.[6]

III

The issue at the heart of this case is whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system[7] would have called for the layoff of black employees with less seniority.[8] We are convinced that the Court of Appeals erred in resolving this issue and in affirming the District Court.

A

[5, 6] The Court of Appeals first held that the injunction did no more than enforce the terms of the agreed-upon consent decree. This specific-performance approach rests on the notion that because the City was under a general obligation to use its best efforts to increase the proportion of blacks on the force, it breached the decree by attempting to effectuate a layoff policy reducing the percentage of black employees in the Department even though such a policy was mandated by the seniority system adopted by the City and the Union. A variation of this argument is that since the decree permitted the District Court to enter any later orders that "may be necessary or appropriate to effectuate the purposes of this decree," 679 F.2d, at 578 (Appendix), the City had agreed in advance to an injunction against layoffs that would reduce the proportion of black employees. We are convinced, however, that both of these are improvident constructions of the consent decree.

6. The present case is distinguishable from *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981), on which the dissent relies in that the defendant in *Camenisch* was not a party to a decree that had been modified by the lower court. When the injunction in that case expired, the defendant was in all respects restored to its pre-injunction status. Here, the City is faced with a modified consent decree that prevents it from applying its seniority system in the manner that it chooses.

7. Respondents contend that the memorandum of understanding between the Union and the City is unenforceable under state law, citing *Fulenwider v. Firefighters Association Local Union 1784*, 649 S.W.2d 268 (Tenn.1982). However, the validity of that memorandum under state law is unimportant for purposes of the issues presented in this case. First, the Court of Appeals assumed that the memorandum was valid in reaching its decision. 679 F.2d, at 564, n. 20. Since we are reviewing that decision, we are free to assume the same. Moreover, even if the memorandum is unenforceable, the City's seniority system is still in place. The City unilaterally adopted the seniority system citywide in 1973. That policy was incorporated into the memorandum of understanding with the Firefighters Union in 1975, but its citywide effect, including its application to the Fire Department, continues irrespective of the status of the memorandum.

8. The dissent's contention that the only issue before us is whether the District Court so misapplied the standards for issuing a preliminary injunction that it abused its discretion, *post*, at 2600, overlooks what the District Court did in this case. The District Court did not purport to apply the standards for determining whether to issue a preliminary injunction. It did not even mention them. Instead, having found that the consent decree did "not contemplate what method would be used for a reduction in rank or layoff," the court considered "whether or not ... it should exercise its authority to modify the consent decree...." Petition for Certiorari, at A73. As noted above, the Court of Appeals correctly recognized that more was at stake than a mere preliminary injunction, stating that the "principal issue" was "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs." 679 F.2d, at 551. By deciding whether the District Court erred in interpreting or modifying the consent decree so as to preclude the City from applying its seniority system, we do not, as the dissent shrills, attempt to answer a question never faced by the lower courts.

It is to be recalled that the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it" or by what "might have been written had the plaintiff established his factual claims and legal theories in litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681–682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). Here, as the District Court recognized, there is no mention of layoffs or demotions within the four corners of the decree; nor is there any suggestion of an intention to depart from the existing seniority system or from the City's arrangements with the Union. We cannot believe that the parties to the decree thought that the City would simply disregard its arrangements with the Union and the seniority system it was then following. Had there been any intention to depart from the seniority plan in the event of layoffs or demotions, it is much more reasonable to believe that there would have been an express provision to that effect. This is particularly true since the decree stated that it was not "intended to conflict with any provisions" of the 1974 decree, 679 F.2d, at 574 (Appendix), and since the latter decree expressly anticipated that the City would recognize seniority, *id.*, at 572. It is thus not surprising that when the City anticipated layoffs and demotions, it in the first instance faithfully followed its preexisting seniority system, plainly having no thought that it had already agreed to depart from it. It therefore cannot be said that the express terms of the decree contemplated that such an injunction would be entered.

[7] The argument that the injunction was proper because it carried out the purposes of the decree is equally unconvincing. The decree announced that its purpose was "to remedy past hiring and promotion practices" of the Department, *id.*, at 575–576, and to settle the dispute as to the "appropriate and valid procedures for hiring and promotion," *id.*, at 574. The decree went on to provide the agreed-upon remedy, but as we have indicated, that remedy did not include the displacement of white employees with seniority over blacks. Furthermore, it is reasonable to believe that the "remedy", which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, at least absent some express provision to that effect. As our cases have made clear, however, and as will be reemphasized below, Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern or practice suit such as this. We thus have no doubt that the City considered its system to be valid and that it had no intention of departing from it when it agreed to the 1980 decree.

Finally, it must be remembered that neither the Union nor the non-minority employees were parties to the suit when the 1980 decree was entered. Hence the entry of that decree cannot be said to indicate any agreement by them to any of its terms. Absent the presence of the Union or the non-minority employees and an opportunity for them to agree or disagree with any provisions of the decree that might encroach on their rights, it seems highly unlikely that the City would purport to bargain away non-minority rights under the then-existing seniority system. We therefore conclude that the injunction does not merely enforce the agreement of the parties as reflected in the consent decree. If the injunction is to stand, it must be justified on some other basis.

B

[8] The Court of Appeals held that even if the injunction is not viewed as compelling compliance with the terms of the decree, it was still properly entered because the District Court had inherent authority to modify the decree when an economic crisis unexpectedly required layoffs which, if carried out as the City proposed, would undermine the affirmative action outlined in the

decree and impose an undue hardship on respondents. This was true, the court held, even though the modification conflicted with a bona fide seniority system adopted by the City. The Court of Appeals erred in reaching this conclusion.[9]

[9] Section 703(h) of Title VII provides that it is not an unlawful employment practice to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discriminate because of race.[10] It is clear that the City had a seniority system, that its proposed layoff plan conformed to that system, and that in making the settlement the City had not agreed to award competitive seniority to any minority employee whom the City proposed to lay off. The District Court held that the City could not follow its seniority system in making its proposed layoffs because its proposal was discriminatory in effect and hence not a bona fide plan. Section 703(h), however, permits the routine application of a seniority system absent proof of an intention to discriminate. *Teamsters v. United States*, 431 U.S. 324, 352, 97 S.Ct. 1843, 1863, 52 L.Ed.2d 396 (1977). Here, the District Court itself found that the layoff proposal was not adopted with the purpose or intent to discriminate on the basis of race. Nor had the City in agreeing to the decree admitted in any way that it had engaged in intentional discrimination. The Court of Appeals was therefore correct in disagreeing with the District Court's holding that the layoff plan was not a bona fide application of the seniority system, and it would appear that the City could not be faulted for following the seniority plan expressed in its agreement with the Union. The Court of Appeals nevertheless held that the injunction was proper even though it conflicted with the seniority system. This was error.

[10] To support its position, the Court of Appeals first proposed a "settlement" theory, *i.e.*, that the strong policy favoring voluntary settlement of Title VII actions permitted consent decrees that encroached on seniority systems. But at this stage in its opinion, the Court of Appeals was supporting the proposition that even if the

9. The dissent seems to suggest, *post*, at 2604–2605, and n. 9, and Justice STEVENS expressly states, *post*, at 2594, that Title VII is irrelevant in determining whether the District Court acted properly in modifying the consent decree. However, this was Title VII litigation, and in affirming modifications of the decree, the Court of Appeals relied extensively on what it considered to be its authority under Title VII. That is the posture in which the case comes to us. Furthermore, the District Court's authority to impose a modification of a decree is not wholly dependent on the decree. "[T]he District's Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *System Federation No. 91 v. Wright*, 364 U.S. 642, 651, 81 S.Ct. 368, 373, 5 L.Ed.2d 349 (1961). In recognition of this principle, this Court in *Wright* held that when a change in the law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified over the objections of one of the parties bound by the decree. By the same token, and for the same reason, a district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute.

Thus, Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the City; the issue cannot be resolved solely by reference to the terms of the decree and notions of equity. Since, as we note at ——, *infra*, Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination, the District Court was precluded from granting such relief over the City's objection in this case.

10. Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e–2(h).

injunction was not merely enforcing the agreed-upon terms of the decree, the District Court had the authority to modify the decree over the objection of one of the parties. The settlement theory, whatever its merits might otherwise be, has no application when there is no "settlement" with respect to the disputed issue. Here, the agreed-upon decree neither awarded competitive seniority to the minority employees nor purported in any way to depart from the seniority system.

[11] A second ground advanced by the Court of Appeals in support of the conclusion that the injunction could be entered notwithstanding its conflict with the seniority system was the assertion that "[i]t would be incongruous to hold that the use of the preferred means of resolving an employment discrimination action decreases the power of a court to order relief which vindicates the policies embodied within Title VII, and 42 U.S.C. §§ 1981 and 1983." 679 F.2d, at 566. The court concluded that if the allegations in the complaint had been proved, the District Court could have entered an order overriding the seniority provisions. Therefore, the court reasoned, "[t]he trial court had the authority to override the Firefighter's Union seniority provisions to effectuate the purpose of the 1980 Decree." 679 F.2d, at 566.

The difficulty with this approach is that it overstates the authority of the trial court to disregard a seniority system in fashioning a remedy after a plaintiff has successfully proved that an employer has followed a pattern or practice having a discriminatory effect on black applicants or employees. If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster. This much is clear from *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) and *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). *Teamsters*, however, also made clear that mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him. 431 U.S., at 367–371, 97 S.Ct., at 1870–1872. Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a non-minority employee laid off to make room for him. He may have to wait until a vacancy occurs,[11] and if there are non-minority employees on layoff, the Court must balance the equities in determining who is entitled to the job. *Teamsters, supra*, 431 U.S., at 371–376, 97 S.Ct., at 1872–1875. See also *Ford Motor Co. v. EEOC*, 458 U.S. 219, 236–240, 102 S.Ct. 3057, 3068–3070, 73 L.Ed.2d 721 (1982). Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination and no award of competitive seniority to any of them. Nor had the parties in formulating the consent decree purported to identify any specific employee entitled to particular relief other than those listed in the exhibits attached to the decree. It therefore seems to us that in light of *Teamsters*, the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed.

[12, 13] Our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII, which affects the

11. Lower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs. See e.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257, 267 (CA4), *cert. denied*, 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980, 988 (CA5 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

remedies available in Title VII litigation.[12] That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates. Opponents of the legislation that became Title VII charged that if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially-balanced work force even though those persons had not been victims of illegal discrimination.[13] Responding to these charges, Senator Humphrey explained the limits on a court's remedial powers as follows:

> "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as § 706(g)] .... Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require ... firing ... of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but is nonexistent." 110 Cong.Rec. 6549 (remarks of Sen. Humphrey).

An interpretative memorandum of the bill entered into the Congressional Record by Senators Clark and Case[14] likewise made clear that a court was not authorized to give preferential treatment to non-victims. "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g)]...." *Id.*, at 7214.

[14] Similar assurances concerning the limits on a court's authority to award make-whole relief were provided by supporters of the bill throughout the legislative process. For example, following passage of the bill in the House, its Republican House sponsors published a memorandum describing the bill. Referring to the remedial powers given the courts by the bill, the memorandum stated: "Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. *But Title VII does not permit the ordering of racial quotas in business or unions....*" *Id.*, at 6566 (emphasis added). In like manner, the principal Senate sponsors, in a bi-partisan news letter delivered during an attempted fili-

12. Section 706(g) provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate.... No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a) of this title." 42 U.S.C. § 2000e-5(g).

13. See H.R.Rep. No. 914, 88th Cong., 1st Sess. 72–73 (minority report), U.S.Code Cong. & Admin.News 1964, 2355; 110 Cong.Rec. 4764 (remarks of Sen. Ervin and Sen. Hill); *id.*, at 5092, 7418–20 (remarks of Sen. Robertson); *id.*, at 8500 (remarks of Sen. Smathers); *id.*, at 9034–35 (remarks of Sen. Stennis and Sen. Tower).

14. Senators Clark and Case were the bipartisan "captains" of Title VII. We have previously recognized the authoritative nature of their interpretative memorandum. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 73, 102 S.Ct. 1534, 1539, 71 L.Ed.2d 748 (1982); *Teamsters, supra*, 431 U.S., at 352, 97 S.Ct., at 1863.

buster to each senator supporting the bill, explained that "[u]nder title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." *Id.*, at 14465.[15]

[15, 16] The Court of Appeals holding that the District Court's order was permissible as a valid Title VII remedial order ignores not only our ruling in *Teamsters* but the policy behind § 706(g) as well. Accordingly, that holding cannot serve as a basis for sustaining the District Court's order.[16]

[17, 18] Finally, the Court of Appeals was of the view that the District Court ordered no more than that which the City unilaterally could have done by way of adopting an affirmative action program. Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that in this case the City took no such action and that the modification of the decree was imposed over its objection.[17]

We thus are unable to agree either that the order entered by the District Court was a justifiable effort to enforce the terms of the decree to which the City had agreed or that it was a legitimate modification of the decree that could be imposed on the City without its consent. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

Justice O'CONNOR, concurring.

The various views presented in the opinions in this case reflect the unusual proce-

15. The dissent suggests that Congress abandoned this policy in 1972 when it amended § 706(g) to make clear that a court may award "any other equitable relief" that the court deems appropriate. *Post*, at 2609–2610. As support for this proposition the dissent notes that prior to 1972, some federal courts had provided remedies to those who had not proven that they were victims. It then observes that in a section-by-section analysis of the bill, its sponsors stated that "in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong.Rec. 7167 (1972).

We have already rejected, however, the contention that Congress intended to codify all existing Title VII decisions when it made this brief statement. See *Teamsters, supra*, 431 U.S., at 354, n. 39, 97 S.Ct., at 1864, n. 39. Moreover, the statement on its face refers only to those sections not changed by the 1972 amendments. It cannot serve as a basis for discerning the effect of the changes that were made by the amendment. Finally, and of most importance, in a later portion of the same section-by-section analysis, the sponsors explained their view of existing law and the effect that the amendment would have on that law.

"The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present § 706(g) *the courts have stressed that the scope of relief under that section of the Act is intended to make victims of unlawful discrimination whole*, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice* be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Id.*, at 7168 (emphasis added).

As we noted in *Franks*, the 1972 amendments evidence "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible *the victims of racial discrimination.*" 424 U.S., at 764, 96 S.Ct., at 1264 (emphasis added).

16. Neither does it suffice to rely on the District Court's remedial authority under §§ 1981 and 1983. Under those sections relief is authorized only when there is proof or admission of intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982). Neither precondition was satisfied here.

17. The Court of Appeals also suggested that under *United States v. Swift & Co.*, 286 U.S. 106, 114–115, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932), the decree properly was modified pursuant to the District Court's equity jurisdiction. But *Swift* cannot be read as authorizing a court to impose a modification of a decree that runs counter to statutory policy, see n. 9, *supra*, here §§ 703(h) and 706(g) of Title VII.

dural posture of the case and the difficulties inherent in allocating the burdens of recession and fiscal austerity. I concur in the Court's treatment of these difficult issues, and write separately to reflect my understanding of what the Court holds today.

I

To appreciate the Court's disposition of the mootness issue, it is necessary to place this case in its complete procedural perspective. The parties agree that the District Court and the Court of Appeals were presented with a "case or controversy" in every sense contemplated by Art. III of the Constitution. Respondents, as trial-plaintiffs, initiated the dispute, asking the District Court preliminarily to enjoin the City from reducing the percentage of minority employees in various job classifications within the Fire Department. Petitioners actively opposed that motion, arguing that respondents had waived any right to such relief in the consent decree itself and, in any event, that the reductions-in-force were bona fide applications of the citywide seniority system. When the District Court held against them, petitioners followed the usual course of obeying the injunction and prosecuting an appeal. They were, however, unsuccessful on that appeal.

Respondents now claim that the case has become moot on certiorari to this Court. The recession is over, the employees who were laid off or demoted have been restored to their former jobs, and petitioners apparently have no current need to make seniority-based layoffs. The res judicata effects of the District Court's order can be eliminated by the Court's usual practice of vacating the decision below and remanding with instructions to dismiss. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950). Thus, respondents conclude that the validity of the preliminary injunction is no longer an issue of practical significance and the case can be dismissed as moot. See Brief for Respondents 26–28.

I agree with the Court that petitioners and respondents continue to wage a controversy that would not be resolved by merely vacating the preliminary injunction. As a result of the District Court's order, several black employees have more seniority for purposes of future job decisions and entitlements than they otherwise would have under the city's seniority system. This added seniority gives them an increased expectation of future promotion, an increased priority in bidding on certain jobs and job transfers, and an increased protection from future layoffs. These individuals, who are members of the respondent class, have not waived their increased seniority benefits. Therefore, petitioners have a significant interest in determining those individuals' claims in the very litigation in which they were originally won. As the Court of Appeals noted, if petitioner-employer does not vigorously defend the implementation of its seniority system, it will have to cope with deterioration in employee morale, labor unrest, and reduced productivity. See *Stotts v. Memphis Fire Department*, 679 F.2d 541, 555, and n. 12 (CA6 1982); see also *Ford Motor Co. v. EEOC*, 458 U.S. 219, 229, 102 S.Ct. 3057, 3064, 73 L.Ed.2d 721 (1982). Likewise, if petitioner-union accedes to discriminatory employment actions, it will lose both the confidence of its members and bargaining leverage in the determination of who should ultimately bear the burden of the past (and future) fiscal shortages. See *ante*, at 2584, and n. 5. Perhaps this explains why, in respondents' words, "the city and union have expended substantial time and effort ... in [an] appeal which can win no possible relief for the individuals on whose behalf it has ostensibly been pursued." Brief for Respondents 44.

When collateral effects of a dispute remain and continue to affect the relationship of litigants,[1] the case is not moot. See,

1. This case is distinguishable from *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981), where the Court found that a petitioner's objections to a prelimi-

e.g., *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755–757, 96 S.Ct. 1251, 1255–1260, 47 L.Ed.2d 444 (1976); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121–125, 94 S.Ct. 1694, 1697–1699, 40 L.Ed.2d 1 (1974); *Gray v. Sanders*, 372 U.S. 368, 375–376, 83 S.Ct. 801, 805–806, 9 L.Ed.2d 821 (1963). In such cases, the Court does not hesitate to provide trial defendants with "a definitive disposition of their objections" on appeal, *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 440, 96 S.Ct. 2697, 2706, 49 L.Ed.2d 599 (1976), because vacating the res judicata effects of the decision would not bring the controversy to a close. See Note, Mootness on Appeal in the Supreme Court, 83 Harv.L.Rev. 1672, 1677–1687 (1970). As the Court wisely notes, "[litigants] cannot invoke the jurisdiction of a federal court ... and then insulate [the effects of that court's] ruling from appellate review by claiming that they are no longer interested in the matter." *Ante*, at 2585.

II

My understanding of the Court's holding on the merits also is aided by a review of the place this case takes in the history of the parties' litigation. The city entered into a consent decree with respondents, agreeing to certain hiring and promotional goals, backpay awards, and individual promotions. The city was party both to another consent decree and to an agreement with the union concerning application of the seniority system at the time it made these concessions. Respondents did not seek the union's participation in the negotiation of their consent decree with the city, did not include the seniority system as a subject of negotiation, and waived all rights to seek further relief. When the current dispute arose, the District Court rejected respondents' allegation that the seniority system had been adopted or applied with any discriminatory animus. It held, however, that "modification" was appropriate because of the seniority system's discriminatory effects. Under these circumstances, the Court's conclusion that the District Court had no authority to order maintenance of racial percentages in the Department is, in my view, inescapable.

Had respondents presented a plausible case of discriminatory animus in the adoption or application of the seniority system, then the Court would be hard pressed to consider entry of the preliminary injunction an abuse of discretion. But that is not what happened here. To the contrary, the District Court rejected the claim of discriminatory animus, and the Court of Appeals did not disagree. Furthermore, the District Court's erroneous conclusion to the contrary, maintenance of racial balance in the Department could not be justified as a correction of an employment policy with an unlawful disproportionate impact. Title VII affirmatively protects bona fide seniority systems, including those with discriminatory effects on minorities. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982); *Teamsters v. United States*, 431 U.S. 324, 352, 97 S.Ct. 1843, 1863, 52 L.Ed.2d 396 (1977).

Therefore, the preliminary injunction could only be justified as a reasonable interpretation of the consent decree or as a permissible exercise of the District Court's authority to modify that consent decree. Neither justification was present here. For the reasons stated by the Court, *ante*, at 2586–2587, and Justice STEVENS, *post*,

nary injunction, which required it to pay for the respondent's sign-language interpreter, were moot. In *Camenisch*, the propriety of issuing the preliminary injunction was really no longer of concern to the parties, and the real issue—who should pay for the interpreter—was better handled in a separate proceeding. *Id.*, at 394–398, 101 S.Ct., at 1833–1835. In this case, because the parties are in an ongoing relationship, they have a continuing interest in the propriety of the preliminary relief itself. *Camenisch* expressly distinguishes cases like this one, where the parties retain "a legally cognizable interest in the determination whether the preliminary injunction was properly granted[.]" *Id.*, at 394, 101 S.Ct., at 1833; see also *id.*, at 397, and n. 2, 101 S.Ct., at 1834, and n. 2.

at 2595, the consent decree itself cannot fairly be interpreted to bar use of the seniority policy or to require maintenance of racial balances previously achieved in the event layoffs became necessary. Nor can a district court unilaterally modify a consent decree to adjust racial imbalances or to provide retroactive relief that abrogates legitimate expectations of other employees and applicants. See *Steelworkers v. Weber*, 443 U.S. 193, 205–207, 99 S.Ct. 2721, 2728–2729, 61 L.Ed.2d 480 (1979); *Pasadena City Bd. of Education v. Spangler*, *supra*, 427 U.S., at 436–438, 96 S.Ct., at 2704–2705. A court may not grant preferential treatment to any individual or group simply because the group to which they belong is adversely affected by a bona fide seniority system. Rather, a court may use its remedial powers, including its power to modify a consent decree, only to prevent future violations and to compensate identified victims of unlawful discrimination. See *Teamsters v. United States*, *supra*, 431 U.S., at 367–371, 97 S.Ct., at 1870–1872; *Milliken v. Bradley*, 433 U.S. 267, 280–281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977); see also *University of California Regents v. Bakke*, 438 U.S. 265, 307–309, and n. 44, 98 S.Ct. 2733, 2757–2758, and n. 44, 57 L.Ed.2d 750 (1978) (POWELL, J., announcing the judgment of the Court). Even when its remedial powers are properly invoked, a district court may award preferential treatment only after carefully balancing the competing interests of discriminatees, innocent employees, and the employer. See *Ford Motor Co. v. EEOC*, 458 U.S., at 239–240, 102 S.Ct., at 3070; *Teamsters v. United States*, *supra*, 431 U.S., at 371–376, 97 S.Ct., at 1872–1875. In short, no matter how significant the change in circumstance, a district court cannot unilaterally modify a consent decree to adjust racial balances in the way the District Court did here.[2]

To be sure, in 1980, respondents could have gone to trial and established illegal discrimination in the Department's past hiring practices, identified its specific victims, and possibly obtained retroactive seniority for those individuals. Alternatively, in 1980, in negotiating the consent decree, respondents could have sought the participation of the union,[3] negotiated the identities of the specific victims with the union and employer, and possibly obtained limited forms of retroactive relief. But respondents did none of these things. They chose to avoid the costs and hazards of litigating their claims. They negotiated with the employer without inviting the union's participation. They entered into a consent decree without establishing any specific victim's identity. And, most importantly, they waived their right to seek further relief. To allow respondents to obtain relief properly reserved for only identified victims or to prove their victim status now would undermine the certainty of obligation that is condition precedent to employers' acceptance of, and unions' consent to, employment discrimination settlements. See *Steelworkers v. Weber*, *supra*, 443 U.S., at 211, 99 S.Ct., at 2731 (BLACKMUN, J., concurring) (employers enter into settlements to avoid back pay responsibilities and to reduce disparate impact claims). Modifications requiring maintenance of racial balance would not encourage valid settlements[4] of employment discrimination

2. Unlike the dissenters and Justice STEVENS, I find persuasive the Court's reasons for holding Title VII relevant to analysis of the modification issue, see *ante*, at 2587, and n. 12, and the Court's application of Title VII's provisions to the facts of the present controversy.

3. "Absent a judicial determination, ... the Company ... cannot alter the collective-bargaining agreement without the Union's consent." *W.R. Grace & Co. v. Local 759*, 461 U.S. ——, ——, 103 S.Ct. 2177, 2179, 76 L.Ed.2d 298 (1983). Thus, if innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process.

4. The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees or applicants. See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278–296, 96 S.Ct. 2574, 2577–2586, 49 L.Ed.2d 493 (1976) (Title VII and 42

cases. They would impede them. Thus, when the Court states that this preferential relief could not have been awarded even had *this case* gone to trial, see *ante*, at 2589, it is holding respondents to the bargain they struck during the consent decree negotiations in 1980 and thereby furthering the statutory policy of voluntary settlement. See *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, and n. 14, 101 S.Ct. 993, 998, and n. 14, 67 L.Ed.2d 59 (1981).

In short, the Court effectively applies the criteria traditionally applicable to the review of preliminary injunctions. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975). When the Court disapproves the preliminary injunction issued in this case, it does so because respondents had no chance of succeeding on the merits of their claim. The District Court had no authority to order the Department to maintain its current racial balance or to provide preferential treatment to blacks. It therefore abused its discretion. On this understanding, I join the opinion and judgment rendered by the Court today.

Justice STEVENS, concurring in the judgment.

The District Court's preliminary injunction remains reviewable because of its continuing effect on the city's personnel policies. That injunction states that the city may "not apply the seniority policy proposed insofar as it will decrease the percentage of black [persons] in the Memphis Fire Department." [1] Thus, if the city faces a need to lay off Fire Department employees in the future, it may not apply its seniority system. I cannot say that the likelihood that the city will once again face the need to lay off Fire Department employees is so remote that the city has no stake in the outcome of this litigation.[2]

In my judgment, the Court's discussion of Title VII is wholly advisory. This case involves no issue under Title VII; it only involves the administration of a consent decree. The District Court entered the consent decree on April 25, 1980, after having given all parties, including all of the petitioners in this Court, notice and opportunity to object to its entry. The consent decree, like any other final judgment of a district court, was immediately appealable. See *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981). No appeal was taken. Hence, the consent decree became a final judgment binding upon those who had had notice and opportunity to object; it was and is a legally enforceable obligation. If the consent decree justified the District Court's preliminary injunction, then that injunction should be upheld irrespective of whether Title VII would authorize a similar injunction.[3]

U.S.C. § 1981 prohibit discrimination against whites as well as blacks); *Steelworkers v. Weber*, 443 U.S. 193, 208–209, 99 S.Ct. 2721, 2729–2730, 61 L.Ed.2d 480 (1979) (listing attributes that would make affirmative action plan impermissible); cf. *id.*, at 215, 99 S.Ct., at 2733 (BLACKMUN, J., concurring) ("seniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights").

1. See also *supra*, at 2581–2582, n. 6. There were actually three injunctive orders entered by the District Court, each applying to different positions in the Memphis Fire Department. All use substantially the same language.

2. In this respect, this litigation is similar to *City of Los Angeles v. Lyons*, 461 U.S. ——, ——, 103 S.Ct. 1660, ——, 75 L.Ed.2d 675 (1983). There, an injunction against the use of chokeholds by the city's police department was held not to be moot despite the fact that the police board had instituted a voluntary moratorium of indefinite duration on chokeholds, since the likelihood that the city might one day wish to return to its former policy was not so remote as to moot the case. See also *Carroll v. Princess Anne*, 393 U.S. 175, 178–179, 89 S.Ct. 347, 350, 21 L.Ed.2d 325 (1968).

3. The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII. *Ante*, at 2588. I share Justice BLACKMUN's doubts as to whether this is the correct test. See *post*, at 2605, n. 9, 2606–2607. The provisions on which the Court relies, 42 U.S.C. §§ 2000e–2(h) and 2000e–5(g), merely state that certain seniority arrangements do not violate

Therefore, what governs this case is not Title VII, but the consent decree.[4]

There are two ways in which the District Court's injunction could be justified. The first is as a construction of the consent decree. If the District Court had indicated that it was merely enforcing the terms of the consent decree, and had given some indication of what portion of that decree it was interpreting, I might be hard pressed to consider the entry of the injunction an abuse of discretion. However, the District Court never stated that it was construing the decree, nor did it provide even a rough indication of the portion of the decree on which it relied. There is simply nothing in the record to justify the conclusion that the injunction was based on a reasoned construction of the consent decree.[5]

The second justification that could exist for the injunction is that the District Court entered it based on a likelihood that it would modify the decree, or as an actual modification of the decree.[6] As Justice BLACKMUN explains, *post*, at 2602, 2605, modification would have been appropriate if respondents had demonstrated the presence of changed circumstances. However, the only "circumstance" found by the District Court was that the city's proposed layoffs would have an adverse effect on the level of black employment in the fire department. App. to Pet. for Cert. A73–A76. This was not a "changed" circumstance; the percentage of blacks employed by the Memphis Fire Department at the time the decree was entered meant that even then it was apparent that any future seniority-based layoffs would have an adverse effect on blacks. Thus the finding made by the District Court was clearly insufficient to support a modification of the consent decree, or a likelihood thereof.

Accordingly, because I conclude that the District Court abused its discretion in entering the preliminary injunction at issue here, I concur in the judgment.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

Today's opinion is troubling less for the law it creates than for the law it ignores. The issues in these cases arose out of a preliminary injunction that prevented the

Title VII, and define the limits of appropriate relief for a Title VII violation, respectively. They do not place any limitations on what the parties can agree to in a consent decree. The Court does not suggest that any other statutory provision was violated by the District Court. The Court itself acknowledges that the administration of a consent decree must be tested by the four corners of the decree, and not by what might have been ordered had respondents prevailed on the merits, *ante*, at 2586, which makes its subsequent discussion of Title VII all the more puzzling.

4. If the decree had been predicated on a finding that the city had violated Title VII, the remedial policies underlying that Act might be relevant, at least as an aid to construction of the decree. But since the settlement expressly disavowed any such finding, the Court's exposition of Title VII law is unnecessary.

5. Justice BLACKMUN explains, *post*, at 2603–2605, how the consent decree could be construed to justify the injunction. I find nothing in the record indicating that this is the theory the District Court actually employed. While I recognize that preliminary injunction proceedings are often harried affairs and that district courts need substantial leeway in resolving them, it nevertheless remains the case that there must be something in the record explaining the reasoning of the District Court before it may be affirmed. That is the purpose of Fed.Rule Civ.P. 65(d)'s requirement that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance...."

6. It seems likely that this second justification was the actual basis for the entry of the injunction. The District Court's phrasing of the question it faced was whether "it should exercise its authority to modify a Consent Decree," App. to Pet. for Cert. A73. The focus of the Court of Appeals' opinion reviewing the preliminary injunction was the "three grounds upon which a Consent Decree may later be modified," *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 560 (CA6 1981). Most important, the practical effect of the District Court's action indicates that it should be treated as a modification. Until it is reviewed, it will effectively govern the procedure that the city must follow in any future layoffs, and that procedure is significantly different from the seniority system in effect when the consent decree was negotiated and signed.

city of Memphis from conducting a particular layoff in a particular manner. Because that layoff has ended, the preliminary injunction no longer restrains any action that the city wishes to take. The Court nevertheless rejects respondents' claim that these cases are moot because the Court concludes that there are continuing effects from the preliminary injunction and that these create a continuing controversy. The Court appears oblivious, however, to the fact that any continuing legal consequences of the preliminary injunction would be erased by simply vacating the Court of Appeals' judgment, which is this Court's longstanding practice with cases that become moot.

Having improperly asserted jurisdiction, the Court then ignores the proper standard of review. The District Court's action was a preliminary injunction reviewable only on an abuse of discretion standard; the Court treats the action as a permanent injunction and decides the merits, even though the District Court has not yet had an opportunity to do so. On the merits, the Court ignores the specific facts of these cases that make inapplicable the decisions on which it relies. Because, in my view, the Court's decision is demonstrably in error, I respectfully dissent.

I

Mootness. "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973). In the absence of a live controversy, the constitutional requirement of a "case" or "controversy," see U.S. Const., Art. III, deprives a federal court of jurisdiction. Accordingly, a case, although live at the start, becomes moot when intervening acts destroy the interest of a party to the adjudication. *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). In such a situation, the federal practice is to vacate the judgment and remand the case with a direction to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950).

Application of these principles to the present cases is straightforward. The controversy underlying the suits is whether the city of Memphis' proposed layoff plan violated the 1980 consent decree. The District Court granted a preliminary injunction limiting the proportion of Negroes that the city could layoff as part of its efforts to solve its fiscal problems. Because of the injunction, the city chose instead to reduce its workforce according to a modified layoff plan under which some whites were laid off despite their greater seniority over the blacks protected by the preliminary injunction. Since the preliminary injunction was entered, however, the layoffs all have terminated and the city has taken back every one of the workers laid off pursuant to the modified plan. Accordingly, the preliminary injunction no longer restrains the city's conduct, and the adverse relationship between the opposing parties concerning its propriety is gone. A ruling in this situation thus becomes wholly advisory, and ignores the basic duty of this Court " 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *Oil Workers v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 394, 4 L.Ed.2d 373 (1960), quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). The proper disposition, therefore, is to vacate the judgment and remand the cases with directions to dismiss them as moot.

The purpose of vacating a judgment when it becomes moot while awaiting review is to return the legal relationships of the parties to their status prior to initiation of the suit. The Court explained in *Munsingwear* that vacating a judgment

"clears the path for future relitigation of the issues between the parties and elimi-

nates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." 340 U.S., at 40, 71 S.Ct., at 107.

Were the Court to follow this procedure in these cases, as clearly it should, the legal rights of the parties would return to their status prior to entry of the preliminary injunction. In the event that future layoffs became necessary, respondents would have to seek a new injunction based on the facts presented by the new layoffs, and petitioners could oppose the new injunction on any and all grounds, including arguments similar to those made in these cases.

Struggling to find a controversy on which to base its jurisdiction, the Court offers a variety of theories as to why these cases remain live. First, it briefly suggests that the cases are not moot because the preliminary injunction continues in effect and would apply in the event of a future layoff. My fundamental disagreement with this contention is that it incorrectly interprets the preliminary injunction.[1] Even if the Court's interpretation of the preliminary injunction is correct, however, it is nonetheless true that if the judgment in these cases were vacated, the preliminary injunction would not apply to a future layoff.

The Court's second argument against mootness is remarkable. The Court states that even if the preliminary injunction applies only to the 1981 layoffs, the "rulings" that formed the "predicate" for the preliminary injunction "remain undisturbed." *Ante*, at 2583. The Court then states:

> "[W]e see no indication that respondents concede in urging mootness that these rulings were in error and should be reversed. To the contrary, they continue to defend them. Unless overturned, these rulings would require the City to obey the modified consent decree and to disregard its seniority agreement in making future layoffs." *Ibid.*

Two aspects of this argument provoke comment. It is readily apparent that vacating the judgment in these cases would also vacate whatever "rulings" formed the "predicate" for that judgment. There simply is no such thing as a "ruling" that has a life independent of the judgment in these cases and that would bind the city in a future layoff if the judgment in these cases were vacated. The Court's argument, therefore, is nothing more than an oxymoronic suggestion that the judgment would somehow have a res judicata effect even if it was vacated—a complete contradiction in terms.

Moreover, and equally remarkable, is the notion that respondents must concede that the rulings below were in error before they can argue that the case is moot. To my knowledge, there is nothing in this Court's mootness doctrine that requires a party urging mootness to concede the lack of merit in his case. Indeed, a central purpose of mootness doctrine is to avoid an unnecessary ruling on the merits.

The Court's third argument against mootness focuses on the wages and seniority lost by white employees during the peri-

1. It is readily apparent from the terms of the preliminary injunction that it applied only to the layoffs contemplated in May 1981, and that the union would have to seek a new injunction if it sought to stop layoffs contemplated in the future. The preliminary injunction applied only to the positions—lieutenant, driver, inspector, and private—in which demotions or layoffs were then planned. It makes little sense to interpret this preliminary injunction to apply to future layoffs that might involve different positions. In addition, the minimum percentage of Negroes that the city was to retain was that of blacks "presently employed" in those positions, a standard that has no pertinence if applied to future layoffs when minority employment levels would be higher than in 1981. App. to Pet. for Cert. in No. 82-229, p. A77. Finally, the reasoning of the District Court in granting the preliminary injunction was based expressly on "the effect of *these* lay-offs and reductions in rank." *Id.*, at A78 (emphasis supplied). Thus, it is clear that the District Court viewed the preliminary injunction as a response to the problem presented by the May 1981 layoffs rather than to the problem of layoffs generally.

od of their layoffs—and it is undisputed that some such pay and seniority were lost. The Court does not suggest, however, that its decision today will provide the affected workers with any backpay or seniority. It is clear that any such backpay or retroactive seniority for laidoff workers would have to come from the city, not from respondents.[2] But the city and the union are both *petitioners* here, not adversaries, and respondents have no interest in defending the city from liability to the union in a separate proceeding. For that reason, these suits involve the wrong adverse parties for resolution of any issues of backpay and seniority.

The Court, nevertheless, suggests that the backpay and seniority issues somehow keep these cases alive despite the absence of an adversarial party. The Court states:

> "Unless the judgment of the Court of Appeals is reversed, however, the layoffs and demotions were in accordance with the law, and it would be quite unreasonable to expect the City to pay out money to which the employees had no legal right. Nor would it feel free to respond to the seniority claims of the three white employees who ... lost competitive seniority in relation to all other individuals who were not laid off, including those minority employees who would have been laid off but for the injunction. On the other hand, if the Court of Appeals' judgment is reversed, the City would be free to take a wholly different position with respect to back pay and seniority." *Ante*, at 2584 (footnote omitted).

Although the artful ambiguity of this passage renders it capable of several interpretations, none of them provides a basis on which to conclude that these cases are not moot. The Court may mean to suggest that the city has no legal obligation to provide backpay and retroactive seniority, but that it might voluntarily do so if this Court opines that the preliminary injunction was improper. A decision in that situation, however, would be an advisory opinion in the full sense—it would neither require nor permit the city to do anything that it cannot do already.

It is more likely that the Court means one of two other things. The Court may mean that if the Court of Appeals' decision is left standing, it would have some kind of preclusive effect in a suit for back pay and retroactive seniority brought by the union against the city. Alternatively, the Court may mean that if the city sought voluntarily to give union members the back pay and retroactive seniority that they lost, the respondents could invoke the preliminary injunction to prohibit the city from doing so.

Even if both of these notions were correct—which they clearly are not, see *infra*, at 2583–2584, and nn. 3, 4, and 5—they are irrelevant to the question of mootness. The union has not filed a suit for backpay or seniority, nor has the preliminary injunction prevented the city from awarding retroactive seniority to the laidoff workers. Accordingly, these issues simply are not in the cases before the Court, and have no bearing on the question of mootness. In *Oil Workers v. Missouri*, *supra*, for example, the Court declined to review an expired antistrike injunction issued pursuant to an allegedly unconstitutional state statute, even though the challenged statute also governed a monetary penalty claim pending in state court against the union. The Court stated: "'[T]hat suit is not before us. We have not now jurisdiction of it or its issues. *Our power only extends over and is limited by the conditions of the case now before us.*'" 361 U.S., at 370, 80 S.Ct., at 396 (emphasis added), quoting *American Book Co. v. Kansas*, 193 U.S. 49, 52, 24 S.Ct. 394, 395, 48 L.Ed. 613

2. In the event that the laidoff firefighters were to bring a successful action for backpay against the city, the city would have no claim for reimbursement against respondents for securing an allegedly erroneous injunction. No bond was posted for the preliminary injunction, and "[a] party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *W.R. Grace & Co. v. Local Union 759*, — U.S. —, —, n. 14, 103 S.Ct. 2177, 2185, n. 14, 76 L.Ed.2d 298 (1983).

(1904). By vacating this judgment as moot, the Court would ensure that in the event that a controversy over backpay and retroactive seniority should arise, the parties in these cases could relitigate any issues concerning the propriety of the preliminary injunction as it relates to that controversy. Thus, the Court today simply has its reasoning backwards. It pretends that these cases present a live controversy because the judgment in them might affect future litigation; yet the Court's longstanding practice of vacating moot judgments is designed precisely to prevent that result.

By going beyond the reach of the Court's Article III powers, today's decision improperly provides an advisory opinion for the city and the union. With regard to the city's ability to give retroactive seniority and backpay to laidoff workers, respondents concede that neither the preliminary injunction nor the Court of Appeals' judgment prohibits the city from taking such action,[3] Brief for Respondents 30–31. The city has not claimed any confusion over its ability to make such an award; it simply has chosen not to do so. Thus, the opinion today provides the city with a decision to ensure that it can do something that it has not claimed any interest in doing and has not been prevented from doing, and that respondents concede they have no way of stopping.

With regard to the union, the Court's imagined controversy is even more hypothetical. The Court concedes that there is doubt whether, in fact, the union possesses any enforceable contractual rights that could form the basis of a contract claim by the union against the city.[4] It is also unclear how the propriety of the preliminary injunction would affect the city's defenses in such a suit.[5] In any

3. It was the city's layoff policy, not the preliminary injunction, that prevented the laidoff workers from accruing seniority during their layoffs. Paragraph 6B of "Benefits" of the city's written "Layoff Policy," adopted unilaterally by the city in April 1981, states: "Employees shall not receive seniority credit during their layoff period." App. 95. If the laidoff workers are to receive retroactive seniority, it will be because the city chooses to change this policy—which they always have been free to do—not because the preliminary injunction has been invalidated. Although the Court feigns uncertainty on this matter, *ante*, at 2584, n. 5, as does Justice O'CONNOR in her separate opinion, *ante*, at 2581, there is simply no indication in these cases that the city wants to give the laidoff workers retroactive seniority but is unable to do so because of the preliminary injunction.

4. It appears that if the union enjoys any contractual rights at all, they derive from the "Memorandum of Understanding" between the union and the city, which indicates that layoffs shall be made on the basis of seniority. App. to Pet. for Cert. in No. 82-206, p. A81. The Tennessee Supreme Court recently has confirmed, however, that the Memorandum of Understanding confers no enforceable rights, *Fulenwider v. Firefighters Association Local Union 1784*, 649 S.W.2d 268 (1982), because of state law limits on the authority of municipalities to contract with labor organizations. Thus, the likely reason that the union has not filed a suit for backpay is because it has no enforceable rights.

I am at somewhat of a loss trying to understand the Court's suggestion that the District Court's preliminary injunction somehow prevented contract liability from arising between the city and the affected white employees. As is explained more fully, *infra*, the preliminary injunction did not require the city to layoff anyone. The preliminary injunction merely prohibited the city from laying off more than a certain proportion of Negroes. In the face of that constraint, the city decided to proceed with layoffs and to lay off whites instead of the protected Negroes. If in so doing the city breached contractual rights of the white employees, those rights remained enforceable. See *W.R. Grace & Co. v. Local Union 759*, *supra* (employer could be held liable for breach of collective bargaining agreement when, because women employees were protected by an injunction, it laid off male employees with greater seniority).

5. An enjoined party is required to obey an injunction issued by a federal court within its jurisdiction even if the injunction turns out on review to have been erroneous, and failure to obey such an injunction is punishable by contempt. *Walker v. City of Birmingham*, 388 U.S. 307, 314, 87 S.Ct. 1824, 1828, 18 L.Ed.2d 1210 (1967). Given that the city could have been punished for contempt if it had disregarded the preliminary injunction, regardless of whether the injunction on appeal were found erroneous, it seems unlikely that a defense to a breach of contract would turn on whether the preliminary injunction is upheld on appeal as opposed to the

event, no such claims have been filed. Thus, today's decision is provided on the theory that it might affect a defense that the city has not asserted, in a suit that the union has not brought, to enforce contractual rights that may not exist.

II

Because there is now no justiciable controversy in these cases, today's decision by the Court is an improper exercise of judicial power. It is not my purpose in dissent to parallel the Court's error and speculate on the appropriate disposition of these nonjusticiable cases. In arriving at its result, however, the Court's analysis is misleading in many ways, and in other ways it is simply in error. Accordingly, it is important to note the Court's unexplained departures from precedent and from the record.

A

Assuming *arguendo* that these cases are justiciable, then the only question before the Court is the validity of a *preliminary* injunction that prevented the city from conducting layoffs that would have reduced the number of Negroes in certain job categories within the Memphis Fire Department. In granting such relief, the District Court was required to consider respondents' likelihood of success on the merits, the balance of irreparable harm to the parties, and whether the injunction would be in the public interest. *University of Texas v. Camenisch*, 451 U.S. 390, 392, 101 S.Ct. 1830, 1832, 68 L.Ed.2d 175 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975). The question before a reviewing court "is simply whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion." *Id.*, at 932, 95 S.Ct., at 2568.

The Court has chosen to answer a different question. The Court's opinion does not mention the standard of review for a preliminary injunction, and does not apply that standard to these cases. Instead, the Court treats the cases as if they involved a *permanent* injunction, and addresses the question whether the city's proposed layoffs violated the consent decree.[6] That issue was never resolved in the District Court because the city did not press for a final decision on the merits. The issue, therefore, is not properly before this Court. After taking jurisdiction over a controversy that no longer exists, the Court reviews a decision that was never made.

In so doing, the Court does precisely what in *Camenisch*, *supra*, it unanimously concluded was error. *Camenisch* involved a suit in which a deaf student obtained a preliminary injunction requiring that the University of Texas pay for an interpreter to assist him in his studies. While appeal

city's obligation to obey the injunction when entered.

6. The Court's attempt to recharacterize the preliminary injunction as a permanent one is wholly unpersuasive. Respondents' request for injunctive relief specifically sought a preliminary injunction, and carefully laid out the standards for the issuance of such an injunction. App. 20–22. Petitioners' response in opposition to the request for injunctive relief was devoted entirely to explaining that the standards for a preliminary injunction had not been met. *Id.*, at 25–28. The District Court's order granting injunctive relief was entitled an "Order Granting Preliminary Injunction," and a later order expanding the injunctive relief to include more positions was entitled an "Order Expanding Preliminary Injunction." App. to Pet. for Cert. in No. 82–229, pp. A77, A82. The Court of Appeals expressly defined the nature of its inquiry by stating:

"We must weigh whether the plaintiffs have shown a possibility of success on the merits, whether the plaintiff or defendant would suffer irreparable harm and whether the public interest warrants the injunction.... The standard of appellate review is whether the district court abused its discretion in granting the preliminary injunction.

"[The District Judge] did not abuse his discretion in granting the preliminary injunction." 679 F.2d 541, 560 (CA6 1982).

It is hard to imagine a clearer statement that the issue considered by the Court of Appeals was the propriety of a preliminary injunction. In any event, even if the Court of Appeals went beyond the scope of its appropriate review, it would be our duty to correct that error, not to follow it.

of the preliminary injunction was pending before the Court of Appeals, the student graduated. The Court of Appeals affirmed the District Court. In so doing, the appellate court rejected Camenisch's suggestion that his graduation rendered the case moot because the District Court had required Camenisch to post a bond before granting the preliminary injunction, and there remained the issue whether the University or Camenisch should bear the cost of the interpreter. This Court granted certiorari and vacated and remanded the case to the District Court. The Court explained:

"The Court of Appeals correctly held that the case as a whole is not moot, since, as that Court noted, it remains to be decided who should ultimately bear the cost of the interpreter. However, *the issue before the Court of Appeals was not who should pay for the interpreter, but rather whether the District Court had abused its discretion in issuing a preliminary injunction requiring the University to pay for him.... The two issues are significantly different, since whether the preliminary injunction should have issued depended on the balance of factors [for granting preliminary injunctions], while whether the University should ultimately bear the cost of the interpreter depends on a final resolution of the merits of Camenisch's case.*

. . . . .

Until [a trial on the merits] has taken place, it would be inappropriate for this Court to intimate any view on the merits of the lawsuit." 451 U.S., at 393, 398, 101 S.Ct., at 1835 (emphasis added).

Camenisch makes clear that a determination of a party's entitlement to a preliminary injunction is a separate issue from the determination of the merits of the party's underlying legal claim, and that a reviewing court should not confuse the two. Even if the issues presented by the preliminary injunction in these cases were not moot, therefore, the only issue before this Court would be the propriety of preliminary injunctive relief.[7] See, also, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 716, 101 S.Ct. 2599, 2600, 69 L.Ed.2d 357 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S., at 931–932, 934, 95 S.Ct., at 2567–2568, 2569. It is true, of course, that the District Court and the Court of Appeals had to make a preliminary evaluation of respondents' likelihood of success on the merits, but that evaluation provides no basis for deciding the merits:

"Since Camenisch's likelihood of success on the merits was one of the factors the District Court and the Court of Appeals considered in granting Camenisch a preliminary injunction, it might be suggested that their decisions were tantamount to decisions on the underlying merits and thus that the preliminary-injunction issue is not truly moot.... *This reasoning fails, however, because*

7. The distinction between the preliminary and final injunction stages of a proceeding is more than mere formalism. The time pressures involved in a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development, and make all such determinations necessarily provisional. Like the proceedings in *Camenisch*, those in this litigation "bear the marks of the haste characteristic of a request for a preliminary injunction." 451 U.S., at 398, 101 S.Ct., at 1835. The hearing on the preliminary injunction was held four days after the layoffs had been announced. With the exception of a single deposition the day before the hearing, there was no discovery. In opening the hearing, the trial judge noted: "One of the problems with these injunction hearings centers around the fact that the lawyers don't have the usual time to develop the issues, and take discovery, and exchange information, and to call on each other to state what they think the issues are ... I got an idea from the lawyers—I am not sure that they were finally decided on what route they were going...." App. 30. It is true that the District Court made a few of what generously could be described as findings and conclusions, but, as the Court in *Camenisch* pointed out, "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." 451 U.S., at 395, 101 S.Ct., at 1834. Accordingly, there is simply no proper basis on which this Court legitimately can decide the question whether the city's proposed layoffs violated the consent decree.

it improperly equates 'likelihood of success' with 'success,' and what is more important, because it ignores the significant procedural differences between preliminary and permanent injunctions." 451 U.S., at 394, 101 S.Ct., at 1833 (emphasis added).

B

After ignoring the appropriate standard of review, the Court then focuses on an issue that is not in these cases. It begins its analysis by stating that the "issue at the heart of this case" is the District Court's power to "ente[r] an injunction requiring white employees to be laid off." *Ante*, at 2585. That statement, with all respect, is simply incorrect. On its face, the preliminary injunction prohibited the city from conducting layoffs in accordance with its seniority system "insofar as it will decrease the percentage of black[s] ... presently employed" in certain job categories. App. to Pet. for Cert. in No. 82-229, p. A80. The preliminary injunction did not require the city to lay off any white employees at all. In fact, several parties interested in the suit, including the union, attempted to persuade the city to avoid layoffs entirely by reducing the working hours of all fire department employees. See Brief for Respondents 73. Thus, although the District Court order reduced the city's options in meeting its fiscal crisis, it did not require the dismissal of white employees. The choice of a modified layoff plan remained that of the city.

This factual detail is important because it makes clear that the preliminary injunction did not abrogate the contractual rights of white employees. If the modified layoff plan proposed by the city to comply with the District Court's order abrogated contractual rights of the union, those rights remained enforceable. This Court recognized this principle just last Term in *W.R. Grace & Co. v. Local Union 759*, — U.S. —, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), which presented a situation remarkably similar to the one here. In that case, an employer sought to conduct layoffs and faced a conflict between a Title VII conciliation agreement protecting its female employees and the seniority rights of its male employees. The employer chose to lay off male employees, who filed grievances and obtained awards for the violation of their contractual rights. In upholding the awards, this Court explained that the dilemma faced by the employer did not render the male employees' contractual rights unenforceable:

> "Given the Company's desire to reduce its workforce, it is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective bargaining agreement, or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations." *Id.*, at —, 103 S.Ct., at 2184.

It is clear, therefore, that the correctness of the District Court's interpretation of the decree is irrelevant with respect to the enforceability of the union's contractual rights; those rights remained enforceable regardless of whether the city had an obligation not to lay off blacks.[8] The question in these cases remains whether the District Court's authority pursuant to the consent decree enabled it to enjoin a layoff of more than a certain number of blacks. The issue is not whether the District Court could require the city to layoff whites, or whether the District Court could abrogate contractual rights of white firefighters.

III

Assuming, as the Court erroneously does, that the District Court entered a permanent injunction, the question on review

8. Judge Martin's opinion concurring in part and dissenting in part from the Sixth Circuit's decision is based on precisely this point. See 679 F.2d, at 569.

then would be whether the District Court had authority to enter it. In affirming the District Court, the Court of Appeals suggested at least two grounds on which respondents might have prevailed on the merits.

The first of these derives from the contractual characteristics of a consent decree. Because a consent decree "is to be construed for enforcement purposes essentially as a contract," *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975), respondents had the right to specific performance of the terms of the decree. If the proposed layoffs violated those terms, the District Court could issue an injunction requiring compliance with them. Alternatively, the Court of Appeals noted that a court of equity has inherent power to modify a consent decree in light of changed circumstances. 679 F.2d 541, 560–561 (CA6 1982). Thus, if respondents could show that changed circumstances justified modification of the decree, the District Court would have authority to make such a change.

Respondents based their request for injunctive relief primarily on the first of these grounds, and the Court's analysis of this issue is unpersuasive. The District Court's authority to enforce the terms and purposes of the consent decree was expressly reserved in ¶ 17 of the decree itself: "The Court retains jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." App. to Pet. for Cert. in No. 82–229, p. A69. Respondents relied on that provision in seeking the preliminary injunction. See Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction 1. The decree obligated the city to provide certain specific relief to particular individuals, and to pursue a long-term goal to "raise the black representation in each job classification on the fire department to levels approximating the black proportion of the civilian labor force in Shelby County." App. to Pet. for Cert. in No. 82–229, p. A64. The decree set more specific goals for hiring and promotion opportunities as well. To meet these goals, the decree "require[d] reasonable, good faith efforts on the part of the City." *Ibid.*

In support of their request for a preliminary injunction, respondents claimed that the proposed layoffs would adversely affect blacks significantly out of proportion to their representation. Supplemental Memorandum in Support of a Preliminary Injunction, pp. 1–2. They argued that the proposed layoffs were "designed to thwart gains made by blacks" under the decree. *Id.*, at 2. Their argument emphasized that the Mayor had "absolute discretion to choose which job classifications" were to be affected by the layoffs, *ibid.*, and that the "ranks chosen by the Mayor for demotion are those where blacks are represented in the greatest number." *Id.*, at 4. Respondents claimed that such a layoff plan "violates the spirit of the 1980 Consent Decree." *Id.*, at 3. Had respondents been able to prove these charges at trial, they may well have constituted a violation of the city's obligation of good faith under the decree. On the basis of these claims, the limited evidence presented at the hearing prior to the issuance of the preliminary injunction, and the District Court's familiarity with the city's past behavior, the District Court enjoined the city from laying off blacks where the effect would have been to reduce the percentage of black representation in certain job categories. By treating the District Court's injunction as a permanent one, however, the Court first deprives respondents of the opportunity to substantiate these claims, and then faults them for having failed to do so. But without determining whether these allegations have any substance, there is simply no way to determine whether the proposed layoff plan violated the terms of the consent decree.

Even if respondents could not have shown that the proposed layoff plan conflicted with the city's obligation of good faith, ¶ 17 of the Decree also empowered

the District Court to enter orders to "effectuate the purposes" of the decree. Thus, if the District Court concluded that the layoffs would frustrate those purposes, then the decree empowered the District Court to enter an appropriate order. Once again, however, on the limited factual record before the Court, it is improper to speculate about whether the layoffs would have frustrated the gains made under the consent decree sufficiently to justify a permanent injunction.

The Court rejects the argument that the injunctive relief was a proper exercise of the power to enforce the purposes of the decree principally on the ground that the remedy agreed upon in the consent decree did not specifically mention layoffs. *Ante*, at 2586. This treatment of the issue is inadequate. The power of the District Court to enter further orders to effectuate the purposes of the decree was a part of the agreed remedy. The parties negotiated for this, and it is the obligation of the courts to give it meaning. In an ideal world, a well-drafted consent decree requiring structural change might succeed in providing explicit directions for all future contingencies. But particularly in civil rights litigation in which implementation of a consent decree often takes years, such foresight is unattainable. Accordingly, parties to a consent decree typically agree to confer upon supervising courts the authority to ensure that the purposes of a decree are not frustrated by unforeseen circumstances. The scope of such authority in an individual case depends principally upon the intent of the parties. Viewed in this light, recourse to such broad notions as the "purposes" of a decree is not a rewriting of the parties' agreement, but rather a part of the attempt to implement the written terms. The District Judge in these cases, who presided over the negotiation of the consent decree, is in a unique position to determine the nature of the parties' original intent, and he has a distinctive familiarity with the circumstances that shaped the decree and defined its purposes. Accordingly, he should be given special deference to interpret the general and any ambiguous terms in the decree. It simply is not a sufficient response to conclude, as the Court does, that the District Court could not enjoin the proposed layoff plan merely because layoffs were not specifically mentioned in the consent decree.

In this regard, it is useful to note the limited nature of the injunctive relief ordered by the District Court. The preliminary injunction did not embody a conclusion that the city could never conduct layoffs in accordance with its seniority policy. Rather, the District Court preliminarily enjoined a particular application of the seniority system as a basis for a particular set of layoffs. Whether the District Court would enjoin a future layoff presumably would depend on the factual circumstances of that situation. Such a future layoff presumably would affect a different proportion of blacks and whites; the black representation in the fire department presumably would be higher; the layoffs presumably would negate a smaller portion of the gains made under the decree; and the judge would have worked with the parties at implementing the decree for a longer period of time. There is no way of knowing whether the District Court would conclude that a future layoff conducted on the basis of seniority would frustrate the purposes of the decree sufficiently to justify an injunction. For this reason, the Court is wrong to attach such significance to the fact that the consent decree does not provide for a suspension of the seniority system during all layoffs, for that is not what the District Court ordered in these cases.

B

The Court of Appeals also suggested that respondents could have prevailed on the merits because the 1981 layoffs may have justified a modification of the consent decree. This Court frequently has recognized the inherent "power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." *United States v. Swift*

& Co., 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932); accord, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 437, 96 S.Ct. 2697, 2705, 49 L.Ed.2d 599 (1976); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 251, 88 S.Ct. 1496, 1500, 20 L.Ed.2d 562 (1968). "The source of the power to modify is of course the fact that an injunction often requires a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *System Federation v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 371, 5 L.Ed.2d 349 (1961). The test for ruling on a plaintiff's request for a modification of a consent decree is "whether the change serve[s] to effectuate ... the basic purpose of the original consent decree." *Chrysler Corp. v. United States*, 316 U.S., at 562, 62 S.Ct., at 1149.

The Court rejects this ground for affirming the preliminary injunction, not by examining the purposes of the *consent decree* and whether the proposed layoffs justified a modification of the decree, but rather by reference to Title VII. The Court concludes that the preliminary injunction was improper because it "imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Ante*, at 2588. Thus, the Court has chosen to evaluate the propriety of the preliminary injunction by asking what type of relief the District Court could have awarded had respondents litigated their Title VII claim and prevailed on the merits. Although it is far from clear whether that is the right question,[9] it is clear that the Court has given the wrong answer.

Had respondents prevailed on their Title VII claims at trial, the remedies available would have been those provided by § 706(g), 42 U.S.C. § 2000e–5(g). Under that section, a court that determines that an employer has violated Title VII may "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay ..., *or any other equitable relief as the court deems appropriate*" (emphasis added). The scope of the relief that could have been entered on behalf of respondents had they prevailed at trial therefore depends on the nature of relief that is "appropriate" in remedying Title VII violations.

In determining the nature of "appropriate" relief under § 706(g), courts have distinguished between individual relief and race-conscious class relief. Although overlooked by the Court, this distinction is highly relevant here. In a Title VII class-action suit of the type brought by respondents, an individual plaintiff is entitled to an award of individual relief only if he can establish that he was the victim of discrimination. That requirement grows out of the general equitable principles of "make whole" relief; an individual who has suffered no injury is not entitled to an individual award. See *Teamsters v. United States*, 431 U.S. 324,

9. The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial. In addressing the Court's analysis, I do not mean to imply that I accept its premise as correct. In *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), this Court considered whether an affirmative action plan adopted voluntarily by an employer violated Title VII because it discriminated against whites. In holding that the plan was lawful, the Court stressed that the voluntariness of the plan informed the nature of its inquiry. *Id.*, at 200, 99 S.Ct., at 2725; see also *id.*, at 211, 99 S.Ct., at 2731 (concurring opinion). Because a consent decree is an agreement that is enforceable in court, it has qualities of both voluntariness and compulsion. The Court has explained that Congress intended to encourage voluntary settlement of Title VII suits, *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, n. 14, 101 S.Ct. 993, 998, n. 14, 67 L.Ed.2d 59 (1981), and cooperative private efforts to eliminate the lingering effects of past discrimination. *Weber*, 443 U.S., at 201–207, 99 S.Ct., at 2726–2729. It is by no means clear, therefore, that the permissible scope of relief available under a consent decree is the same as could be ordered by a court after a finding of liability at trial.

347–348, 364–371, 97 S.Ct. 1843, 1860–1861, 1869–1872, 52 L.Ed.2d 396 (1977). If victimization is shown, however, an individual is entitled to whatever retroactive seniority, backpay, and promotions are consistent with the statute's goal of making the victim whole. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 762–770, 96 S.Ct. 1251, 1263–1266, 47 L.Ed.2d 444 (1976).

In Title VII class-action suits, the Courts of Appeals are unanimously of the view that race-conscious affirmative relief can also be "appropriate" under § 706(g).[10] See *University of California Regents v. Bakke*, 438 U.S. 265, 301–302, 98 S.Ct. 2733, 2753–2754, 57 L.Ed.2d 750 (opinion of POWELL, J.); *id.*, at 353, n. 28, 98 S.Ct., at 2780, n. 28 (1978) (opinion of BRENNAN, WHITE, MARSHALL and BLACKMUN, JJ.). The purpose of such relief is not to make whole any particular individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future. Because the discrimination sought to be alleviated by race-conscious relief is the class-wide effects of past discrimination, rather than discrimination against identified members of the class, such relief is provided to the class as a whole rather than to its individual members. The relief may take many forms, but in class actions it frequently involves percentages—such as those contained in the 1980 consent decree between the city and respondents—that require race to be taken into account when an employer hires or promotes employees. The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it, and individual beneficiaries of the relief need not show that they were themselves victims of the discrimination for which the relief was granted.

In the instant case, respondents' request for a preliminary injunction did not include a request for individual awards of retroactive seniority—and, contrary to the implication of the Court's opinion, the District Court did not make any such awards. Rather, the District Court order required the city to conduct its layoffs in a race-conscious manner; specifically, the preliminary injunction prohibited the city from conducting layoffs that would "decrease the percentage of black[s]" in certain job categories. The city remained free to lay off any individual black so long as the percentage of black representation was maintained.

Because these cases arise out of a consent decree, and a trial on the merits has never taken place, it is of course impossible for the Court to know the extent and nature of any past discrimination by the city. For this reason, to the extent that the scope of appropriate relief would depend upon the facts found at trial, it is impossible to determine whether the relief provided by the preliminary injunction would have been appropriate following a trial on the merits. Nevertheless, the Court says that the preliminary injunction was inappropriate because, it concludes, respondents could not have obtained similar relief had their cases been litigated instead of settled by a consent decree.

The Court's conclusion does not follow logically from its own analysis. As the

10. See *e.g.*, *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1027–1028 (CA1 1974), cert. denied, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (CA2 1974); *E.E.O.C. v. American Tel. & Tel. Co.*, 556 F.2d 167, 174–177 (CA3 1977), cert. denied, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978); *Chisholm v. United States Postal Service*, 665 F.2d 482, 499 (CA4 1981); *United States v. City of Alexandria*, 614 F.2d 1358, 1363–1366 (CA5 1980); *United States v. I.B.E.W., Local No. 38*, 428 F.2d 144 (CA6), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *United States v. City of Chicago*, 663 F.2d 1354 (CA7 1981) (en banc); *Firefighters Institute v. City of St. Louis*, 616 F.2d 350, 364 (CA8 1980), cert. denied, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553–554 (CA9), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (CA10 1979); *Thompson v. Sawyer*, 219 U.S.App.D.C. 393, 430, 678 F.2d 257, 294 (1982).

Court points out, the consent decree arose out of a Title VII suit brought by respondents alleging, *inter alia*, that the city had engaged in a pattern and practice of discrimination against members of the plaintiff class. Mr. Stotts, the named plaintiff, claimed that he and the class members that he represented had been denied promotions solely because of race, and that because of that discrimination, he and other members of the class had been denied their rightful rank in the Memphis Fire Department. See Complaint of Respondents in No. 82-229, ¶¶ 9 and 10, App. 10. Had respondents' case actually proceeded to trial, therefore, it would have involved the now familiar two-stage procedure established in *Teamsters* and *Franks*. The first stage would have been a trial to determine whether the city had engaged in unlawful discrimination; if so, the case would proceed to the second stage, during which the individual members of the class would have the opportunity to establish that they were victims of discrimination. *Teamsters*, 431 U.S., at 371, 375, 97 S.Ct., at 1874. The Court itself correctly indicates: "If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster." *Ante*, at 2588. Were respondents to prevail at trial on their claims of discrimination, therefore, they would have been entitled to individual awards of relief, including appropriate retroactive seniority. Thus, even treating the District Court's preliminary injunction as if it granted individual awards of retroactive seniority to class members, it is relief that respondents might have obtained had they gone to trial instead of settling their claims of discrimination. Thus, the Court's conclusion is refuted by its own logic and by the very cases on which it relies to come to its result.[11]

For reasons never explained, the Court's opinion has focused entirely on what respondents have actually shown, instead of what they might have shown had trial ensued. It is improper and unfair to fau. respondents for failing to show "that any of the blacks protected from layoff had been a victim of discrimination," *ante*, at 2588, for the simple reason that the claims on which such a showing would have been made never went to trial. The whole point of the consent decree in these cases—and indeed the point of most Title VII consent decrees—is for both parties to avoid the time and expense of litigating the question of liability and identifying the victims of discrimination. In the instant consent decree, the city expressly denied having engaged in any discrimination at all. Nevertheless, the consent decree in this case provided several persons with both promotions and backpay. By definition, all such relief went to persons never determined to be victims of discrimination, and the Court does not indicate that it means to suggest that the original consent decree in these cases was invalid. Any suggestion that a consent decree can provide relief only if a defendant concedes liability would drastically reduce, of course, the incentives for entering into consent decrees. Such a result would be incongruous, given the Court's past statements that "Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, n. 14,

11. The Court's opinion is sufficiently ambiguous to suggest another interpretation. The Court concludes that the preliminary injunction was improper because it gave respondents something they could not have obtained had they proved that "a pattern or practice of discrimination existed." *Ante*, at 2588. It is possible, therefore, that the Court is suggesting that the limit on relief available under a consent decree is that which could be awarded if a plaintiff prevailed in "stage I" of a case but failed to proceed to "stage II" during which the plaintiff seeks to identify actual victims of discrimination. But the Court has failed to provide any support for this odd notion. The rationale underlying its opinion seems to be that the limit of the District Court's remedial power is that which could have been ordered following a trial on the alleged discrimination, not just the first stage of such a trial.

101 S.Ct. 993, 998, n. 14, 67 L.Ed.2d 59 (1981); see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974).

The Court's reliance on *Teamsters* is mistaken at a more general level as well, because *Teamsters* was concerned with individual relief, whereas these cases are concerned exclusively with classwide, race-conscious relief. *Teamsters* arose out of two pattern-or-practice suits filed by the Government alleging that a union and an employer had discriminated against minorities in hiring truck drivers. Prior to a finding of liability, the Government entered into a consent decree in partial resolution of the suit. In that decree, the defendants agreed to a variety of race-conscious remedial actions, including a requirement that the company hire "one Negro or Spanish-surnamed person for every white person" until a certain percentage of minority representation was achieved. 431 U.S., at 330–331, n. 4, 97 S.Ct., at 1852, n. 4. The decree did not settle the claims of individual class members, however, and allowed the individuals whom the court found to be victims of discrimination to seek whatever retroactive seniority was appropriate under Title VII. *Ibid.*

In *Teamsters*, therefore, all class-wide claims had been settled before the case reached this Court. The case concerned only the problems of determining victims and the nature of appropriate individual relief. *Teamsters* did not consider the nature of appropriate affirmative class relief that would have been available had such relief not been provided in the consent decree between the parties. The issue in the present cases, as posed by the Court, is just the reverse. Respondents have not requested individual awards of seniority, and the preliminary injunction made none. Thus, the issue in these cases is the appropriate scope of classwide relief—an issue not present in *Teamsters* when that case came here. *Teamsters* therefore has little relevance for these cases.

The Court seeks to buttress its reliance on *Teamsters* by stressing on the last sentence of § 706(g). That sentence states that a court cannot order the "hiring, reinstatement, or promotion of an individual as an employee ... if such individual ... was refused employment or advancement or was suspended or discharged for any reason other than discrimination" in violation of Title VII. The nature of the Court's reliance on that sentence is unclear, however, because the Court states merely that the District Court "ignores" the "policy behind § 706(g)." *Ante*, at 2588, 2590. For several reasons, however, it appears that the Court relies on the policy of § 706(g) only in making a particularized conclusion concerning the relief granted in these cases, rather than a conclusion about the general availability of race-conscious remedies.

In discussing § 706(g), the Court relies on several passages from the legislative history of the Civil Rights Act of 1964 in which individual legislators stated their views that Title VII would not authorize the imposition of remedies based upon race. And while there are indications that many in Congress at the time opposed the use of race-conscious remedies, there is authority that supports a narrower interpretation of § 706(g). Under that interpretation, the last sentence of § 706(g) addresses only the situation in which a plaintiff demonstrates that an employer has engaged in unlawful discrimination, but the employer can show that a particular individual would not have received the job, promotion or reinstatement even in the absence of discrimination because there was also a lawful justification for the action. See *Patterson v. Greenwood School District 50*, 696 F.2d 293, 295 (CA4 1982); *E.E.O.C. v. American Tel. & Tel. Co.*, 556 F.2d 167, 174–177 (CA3 1977), cert. denied, 438 U.S. 915, 98 S.Ct. 3145, 51 L.Ed.2d 1161 (1978); *Day v. Mathews*, 174 U.S.App.D.C. 231, 233, 530 F.2d 1083, 1085 (1976); *King v. Laborers Int'l Union, Local No. 818*, 443 F.2d 273, 278–279 (CA6 1971). See also Brodin, *The Standard of Causation in the Mixed-Mo-*

tive Title VII Action: A Social Policy Perspective, 82 Colum.L.Rev. 292 (1982). The provision, for example, prevents a court from granting relief where an employment decision is based in part upon race, but where the applicant is unqualified for the job for nondiscriminatory reasons. In that sense, the section merely prevents a court from ordering an employer to hire someone unqualified for the job, and has nothing to do with prospective class-wide relief.

Much of the legislative history supports this view. What is now § 706(g) had its origin in § 707(e) of H.R. 7152, 88th Cong., 1st Sess. (1963). That original version prevented a court from granting relief to someone that had been refused employment, denied promotion, or discharged "for cause." The "for cause" provision presumably referred to what an employer must show to establish that a particular individual should not be given relief. That language was amended by replacing "for cause" with "for any reason other than discrimination on account of race, color, religion or national origin," which was the version of the sentence as passed by the House. The author of the original version and the amendment explained that the amendment's only purpose was to specify cause, and to clarify that a court cannot find a violation of the act that is based upon facts other than unlawful discrimination. 110 Cong.Rec. 2567 (1964) (remarks of Rep. Celler). There is no indication whatever that the amendment was intended to broaden its prohibition to include all forms of prospective race-concious relief.

In any event, § 706(g) was amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 107. The legislative history of that amendment strongly supports the view that Congress endorsed the remedial use of race under Title VII. The amendment added language to the first sentence of § 706(g) to make clear the breadth of the remedial authority of the courts. As amended, the first sentence authorizes a court to order "such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without backpay ... *or any other equitable relief as the court deems appropriate.*" 42 U.S.C. § 2000e–5(g) (emphasized language added in 1972).

In addition, during consideration of the amendment, Congress specifically rejected an attempt to amend Title VII to *prohibit* the use of prospective race-conscious employment goals to remedy discrimination. Senator Ervin proposed an amendment to Title VII intended to prohibit government agencies from requiring employers to adopt goals or quotas for the hiring of minorities. 118 Cong.Rec. 1663–1664 (1972). Senator Javits led the debate against the amendment. *Id.*, at 1664–1676. Significantly, Senator Javits stressed that the amendment would affect not only the activities of federal agencies, but also the scope of judicial remedies available under Title VII. He referred repeatedly to court decisions ordering race-conscious remedies, and asked that two such decisions be printed in the Congressional Record. *Id.*, at 1665–1675.[12] He stated explicitly his view that "[w]hat this amendment seeks to do is to undo ... those court decisions." *Id.*, at 1665. The amendment was rejected by a 2 to 1 margin. *Id.*, at 1676.

With clear knowledge, therefore, of courts' use of race-conscious remedies to correct patterns of discrimination, the 1972 Congress rejected an attempt to amend Title VII to prohibit such remedies. In fact,

12. The two cases placed in the Congressional Record were *United States v. Ironworkers Local 86*, 443 F.2d 544 (CA9), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (a percentage goal for black participation in apprenticeship program as part of remedy for Title VII violation), and *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (CA3), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971) (upheld lawfulness of a plan requiring contractors on federally assisted projects to adopt goals for minority employment). Senator Javits also noted the Justice Department's practice of seeking consent decrees in Title VII cases containing percentage hiring goals. 118 Cong.Rec. 1675 (1972).

the Conference Committee stated: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong.Rec. 7166 (1972). Relying on this legislative history of the 1972 amendment and other actions by the Executive and the courts, four members of this Court, including the author of today's opinion, stated in *University of California Regents v. Bakke*, 438 U.S. 265, 353, n. 28, 98 S.Ct. 2733, 2780, n. 28, 57 L.Ed.2d 750: "Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race" (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). As has been observed, *supra*, n. 10, moreover, the Courts of Appeals are unanimously of the view that race-conscious remedies are not prohibited by Title VII. Because the Court's opinion does not even acknowledge this consensus, it seems clear that the Court's conclusion that the District Court "ignored the policy" of § 706(g) is a statement that the race-conscious relief ordered in these cases was broader than necessary, not that race-conscious relief is never appropriate under Title VII.

IV

By dissenting, I do not mean glibly to suggest that the District Court's preliminary injunction necessarily was correct. Because it seems that the affected whites have no contractual rights that were breached by the city's modified layoff plan, the effect of the preliminary injunction was to shift the pain of the city's fiscal crisis onto innocent employees. This Court has recognized before the difficulty of reconciling competing claims of innocent employees who themselves are neither the perpetrators of discrimination nor the victims of it. "In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" *Teamsters*, 431 U.S., at 375, 97 S.Ct., at 1874, quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–330, 64 S.Ct. 587, 591–592, 88 L.Ed. 754 (1944). If the District Court's preliminary injunction was proper, it was because it correctly interpreted the original intent of the parties to the consent decree, and equitably enforced that intent in what admittedly was a zero-sum situation. If it was wrong, it was because it improperly interpreted the consent decree, or because a less painful way of reconciling the competing equities was within the court's power. In either case, the District Court's preliminary injunction terminated many months ago, and I regret the Court's insistence upon unnecessarily reviving a past controversy.

Significance of the *Stotts* Decision

The *Stotts* case did not involve a court-ordered hiring or promotional quota based on race or gender. Nor did the case involve other court-ordered relief for nonvictims of an employer's discrimination at the expense of innocent third parties in the context of hiring or promotions. The Court's decision, however, which is based on its interpretation of *both* section 703(h) and section 706(g) of Title VII, forbids the use of such court-ordered preferential techniques in hiring or promotions in a Title VII case. The clear import of *Stotts* is that, under Title VII, the only relief courts may provide for individuals or classes of individuals is make-whole relief for victims of an employer's illegal discrimination. A court may not, by consent decree or judgment after trial, order preferential treatment of nonvictims of an employer's discrimination, whether by imposing a quota or any other means, at the expense of innocent third parties in any part of the employment relationship.

Scope of Consent Decrees

An important preliminary skirmish in the case was resolved in footnote nine of Justice White's opinion. There, the Court made clear that a consent decree purportedly aimed at enforcing a statute cannot exceed the scope of relief available under the statute. A "District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce, not from the parties' consent to the decree." 104 S.Ct. at 2587 n.9 (citation omitted). Had this matter been resolved in a contrary fashion, i.e., that relief in a consent decree need not be delimited by the relief available under the statute the decree is designed to enforce, the significance of *Stotts* would have been reduced. Such a contrary result would permit parties who agreed to preferential relief for nonvictims of the employer's discrimination—unlike the parties in *Stotts*—to obtain the imprimatur of a court on their consent decree, even though the court could not order the same preferential relief if the parties were in dispute.

Although Justice White does refer to a court's lack of authority to enter a "disputed" modification of a consent decree if the decree is inconsistent with the statute, his discussion, taken as a whole, clearly means that a court cannot enter *any* consent decree inconsistent with Title VII. His reference to the disputed nature of the modification is descriptive of the facts before him, rather than a pronouncement permitting a court to enter mutually agreed-upon consent decrees even when they conflict with the statute.

Layoffs, Seniority and Merit Systems, and Preferential Relief

This case involved layoffs of more senior employees in favor of less senior employees on the basis of race, in derogation of an employer's bona fide seniority system. These racially preferential layoffs were undertaken to preserve the percentage of black employees in the work force.[1] That percentage of black employees

[1] The district court's injunction did not require anyone to be laid off. It required that the city's seniority policy not be used in a manner that would reduce the percentage of blacks in the work

undoubtedly resulted, at least in part, from the implementation of an earlier Title VII consent decree. The Supreme Court struck down this racially preferential layoff scheme because it violated both section 703(h) and the policy underlying section 706(g). Court orders that currently provide for racially preferential layoffs in favor of nonvictims of an employer's illegal discrimination are now legally infirm and will be challenged.[2]

Moreover, section 703(h) protects bona fide merit systems as well as bona fide seniority systems. Further, even if the city in *Stotts* had sought to comply with the lower court's injunction by reducing every firefighter's workweek in order both to retain the percentage of minority firefighters and to avoid laying off anyone, it is clear under *Stotts* that the lower court's injunction still would be invalid as conflicting with Title VII. That is, *any* court-ordered racial or gender preference in favor of a nonvictim of an employer's illegal discrimination at the expense of an innocent third party in derogation of a bona fide seniority or merit system under Title VII is impermissible under *Stotts*. This flows from the Court's interpretation of sections 703(h) and 706(g). Thus, even had the Memphis Fire Department required a nonvictim of its discrimination to suffer a loss less onerous than a layoff, such as a reduced workweek, in order to preserve the racial composition of its work force as a remedy to alleged discrimination, the *Stotts* decision would bar such action.

It is also worth noting that an employer who is not currently utilizing a seniority system or merit system is just as free after the *Stotts* decision to install either system as he or she was before *Stotts*.

Stotts' Effect on Judicial Relief in Hiring and Promotion

Although the facts of this case did not involve preferential treatment on the basis of gender or race in hiring or promotions, as mentioned earlier, the Court's decision relied on both section 703(h) and section 706(g).[3] In premising its decision in part on section 706(g), the Court has profoundly affected the judicial relief available under Title VII in hiring and promotions, as well as in layoffs.

Section 706(g), as the Court acknowledged, is the basis for a court's remedial authority in Title VII litigation.[4] That authority encompasses remedial action pertaining to hiring and promotions. The last sentence of the section, which expressly limits this remedial power, specifically mentions hiring and promotion of individuals:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of §704(a) of this title. 42 U.S.C. §2000e–5(g) (1982).

Accordingly, when the Supreme Court interprets section 706(g) as "provid[ing] make-whole relief only to those who have been actual victims of illegal discrimination" in the context of a layoff, the significance of that interpretation in the layoff context cannot logically be separated from its significance with respect to hiring and promotions.

Indeed, the Court's heavy reliance on the legislative history of Title VII clearly demonstrates the relevance of the Court's opinion to the scope of a Federal court's

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force. Following entry of the injunction, the city undertook race-conscious layoffs in order to maintain the racial composition of its work force.

[1] Indeed, the Department of Justice and separate private parties have successfully sought to overturn lower court orders providing for racially preferential layoffs of public employees in Cincinatti and Newark. Both orders have been vacated, following *Stotts*, by the Federal district courts that originally entered them. *See* Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv. (June 26, 1984) and United States v. City of Cincinatti (July 3, 1984).

[2] The Court repeatedly rested its decision in this case on both provisions. *E.g.*, Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576, 2587 n.9, 2590 and n.17. Indeed, these citations make reasonably clear that the Supreme Court found it necessary to address the scope of a court's remedial power under Title VII because of its understanding that the minority firefighters might have prevailed in this case even in the face of a bona fide seniority system if they were being provided make-whole relief as "proven" victims of discrimination. That is, the Court may have permitted the minority firefighters to be "slotted" into the bona fide seniority system ahead of incumbent employees, as in *Teamsters* and *Franks* (Teamsters v. United States, 431 U.S. 324 (1979); Franks v. Bowman Transportation Co., 424 U.S. 947 (1976)), to remedy the employer's discrimination against them. Whether the Court would permit such make-whole relief for actual victims if it would cause other employees to be laid off is an issue the Court did not resolve. It appears, however, that the Court looks with disfavor on a make-whole remedy with such an effect. 104 S.Ct. at 2588 and n.11. The Court's discussion of section 706(g), set forth, not in cursory fashion, but in detail over several pages as an integral part of its opinion, is no mere surplusage. *See* especially 104 S.Ct. at 2587 n.9.

[3] 104 S.Ct. at 2588–89.

Title VII remedial authority in the context of hiring and promotions. The Court's discussion of, and citations to, the legislative history of section 706(g) make clear that its interpretation that a court can only award make-whole relief to actual victims of an employer's illegal discrimination is of general applicability.[5] The Court quoted at length the 1964 legislative history of Title VII, which explains that a court's remedial authority under section 706(g) extends only to affording relief for actual victims of discrimination in hiring and other phases of the employment relationship. The majority opinion quoted portions of the legislative history, for example, that specifically disclaim any authority for a court to enter an order requiring quotas.

In one such citation, the Court made prominent use of remarks by Senator Humphrey in explaining a court's authority under section 706(g). 110 Cong. Rec. 6549 (1964). The Court quoted only part of one passage from Senator Humphrey's remarks. The passage in full follows; those portions that the Court left out have been emphasized: "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require *hiring*, firing, *or promotion* of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but is nonexistent." *Id.* This full quote, of course, is cumulative in light of other extensive citations to the legislative history. It further indicates, however, that the Court's interpretation of judicial authority to provide a remedy for individuals or classes of individuals as extending only to the granting of make-whole relief to actual victims is applicable not only when "firing" (or laying off) employees is at issue, but also when hiring and promotions are at issue. Clearly, the Court could hardly attach interpretive significance to one word in one clause of its quote from Senator Humphrey while distinguishing the significance of the rest of the same clause that it chose not to cite for the purpose of resolving the layoff case actually before it.

The Court also cited passages from the legislative history of the 1972 amendments to Title VII and its earlier opinions in *Teamsters* v. *United States*[6] and *Franks* v. *Bowman Transportation Co.*[7] in support of its conclusion that the only relief section 706(g) affords to individuals or classes of individuals is make-whole relief to actual victims of an employer's illegal discrimination.[8] The reference to the legislative history of the 1972 amendments is particularly striking. Advocates of a court's authority to provide relief for nonvictims have frequently cited the language added to Title VII in 1972 and its legislative history as ratifying such judicial authority.[9] The Court dismissed this argument—the linchpin of the case for preferential relief under section 706(g)—in a footnote. 104 S.Ct. at 2590 n.15.

It might be argued that, since the Court did not invalidate the underlying consent decree creating the race-conscious hiring and promotion relief, the Court's ruling has no import for Title VII relief in the context of hiring and promotion. The validity of the underlying consent decree, however, was not at issue in the case. Rather, the Court was faced with an injunction that was creating the harm complained of in the case, i.e., layoffs. The failure of the Court to rule that the underlying consent decree is illegal, then, in no way undermines the impact of *Stotts* in the hiring and promotion contexts.

It also might be argued that *Stotts* addresses only retrospective "make-whole" relief, which is necessarily limited to victims, and does not limit prospective race-conscious class relief aimed at remedying the purported classwide effects of the employer's prior discrimination. Accordingly, this argument holds that *Stotts* affects only seniority and layoff situations, but not situations involving hiring and promotion. This argument is bolstered by two observations. First, the majority opinion made no reference to earlier cases from virtually every appellate court upholding race-conscious remedies for nonvictims under Title VII. Thus, it might be said, it would be unusual for the Court to overturn the virtually unanimous view of the appellate courts without making a reference to those

[5] Of course, actual victims of an employer's discrimination can include nonapplicants for a job or promotion who can meet "the not always easy burden of proving that he would have applied for the job had it not been for those [discriminatory] practices." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 368 (1977). When the nonapplicant meets this burden, he or she is in a position similar to that of an applicant. *Id.*

[6] 431 U.S. 324 (1979).

[7] 424 U.S. 947 (1976).

[8] It should be stressed that the bar against preferential relief is equally applicable to a court's entry of a consent decree or a judgment after trial. 104 S.Ct. at 2587 n.9.

[9] *See* EEOC v. AT&T, 556 F.2d 167, 177 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. Int'l Union of Elevator Constructors, 538 F.2d 1012, 1019–20 (3d Cir. 1976); Patterson v. American Tobacco Co., 535 F.2d 257, 267 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027–28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

decisions. Second, the last sentence of section 706(g) can be interpreted merely to mean that, even if an employer has discriminated, a particular individual is not entitled to a job, promotion, or reinstatement if he or she would not have received such job, promotion, or reinstatement even in the absence of the employer's discrimination.

These arguments, however, are an unpersuasive effort to limit the meaning of the Court's decision: (1) they were all raised by three Justices—in Justice Blackmun's dissenting opinion; the majority clearly was not persuaded by them; (2) moreover, the majority opinion is quite clear and unambiguous, as previously noted, in its interpretation of section 706(g) as extending individual or class relief only to victims of an employer's discrimination. In short, the rationale of the Court's decision clearly renders preferential relief for nonvictims of an employer's discrimination under Title VII impermissible in *all* employment contexts and not just layoffs.

What the *Stotts* Decision Does Not Do

The *Stotts* decision affects only a court's remedial authority under Title VII. *Stotts* does not disturb in any fashion the use of both an "intent" test and an "effects" test in Title VII litigation, and the established burdens of proof under both tests remain unchanged. Class action and "pattern and practice" lawsuits on behalf of classes of actual victims of an employer's illegal discrimination remain available. Of course, courts may still enjoin the use of discriminatory employment practices, in addition to making actual victims whole. Further, courts still have authority to order nondiscriminatory affirmative action remedies such as increased recruiting, training, counseling, and education programs. After *Stotts*, however, a court lacks authority under Title VII to approve a consent decree or to order relief in favor of nonvictims of an employer's illegal discrimination at the expense of innocent third parties, whether in the hiring, promotion, layoff, or other context.[10]

[10] The constitutionality of a public employer's *voluntarily* engaging in preferential treatment in employment, such as the use of quotas at issue in the Detroit Police Department case *(Bratton* v. *City of Detroit)*, remains unsettled at the Supreme Court level. Although the Court denied *certiorari* in *Bratton*, it has long been recognized that a denial of *certiorari* by the Supreme Court does not speak to the merits. Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365 n.1 (1973); Brown v. Allen, 344 U.S. 443, 492 (1953) (Frankfurter, J., in an opinion on this issue expressing the view of a majority of the Court, 344 U.S. at 452); United States v. Carver, 260 U.S. 482, 490 (1923).

The Supreme Court also has not ruled on whether a court may order race-conscious remedies preferring nonvictims of an employer's discrimination in an employment discrimination case brought under the equal protection clause of the 14th amendment or the equal protection component of the due process clause of the 5th amendment. Moreover, the Supreme Court has not addressed this issue under 42 U.S.C. §§1981 or 1983. 42 U.S.C. §1981 provides:

> All persons within. . .the United States shall have the same right. . .to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983 provides that "[e]very person who, under color of [law] subjects, or causes to be subjected, any citizen. . .or other person. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ."

The Court has established, however, that section 1981 reaches only purposeful discrimination and not practices that "merely result in a disproportionate impact on a particular class. . . ." Gen. Bldg. Contractors Assoc. v. Pennsylvania, 458 U.S. 375, 382–91 (1982). The Court similarly has concluded, with respect to section 1983 actions, that a plaintiff must show an intent to discriminate in order to establish a violation. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576, 2590 n.16. The courts do have various remedies available in section 1981 and section 1983 cases, including compensatory damages, backpay, reinstatement, and other forms of injunctive relief. As mentioned earlier, whether remedies under these two statutes, which are triggered only in a case of intentional discrimination, may extend to preferential relief on the basis of race or gender at the expense of innocent third parties in employment discrimination cases has not been determined by the Supreme Court.

An Exchange of Opinion on the *Stotts* Decision

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SENIORITY, MINORITIES AND THE SUPREME COURT

Memphis Did Not Kill Affirmative Action

By DOUGLAS F. SEAVER

LAST month, the Supreme Court rendered one its most important decisions on discrimination law since the Civil Rights Act of 1964. The Court, with a six-to-three majority, ruled that the terms of a bona fide seniority system take precedence over an affirmative action plan when layoffs are involved. The court's decision cleared the way for the City of Memphis to dismiss firefighters on a last-hired, first-fired basis, which would disparately impact minority firefighters, even though the City had signed a consent decree in an earlier class action discrimination case agreeing to percentage goals for black hires and promotions.

Many civil rights leaders have condemned the decision as the death knell for affirmative action. A close analysis of the case, however, suggests such dire conclusions may be premature. Nevertheless, the decision means minorities and women will have to be much more careful about the terms of their employment contracts.

Initially, a class action was begun in the United States District Court for the Western District of Tennessee in 1977 by Carl Stotts, a black firefighter captain. He charged that the Memphis Fire Department and other city officials were discriminating against blacks in hirings and promotions. Before the case reached trial, the parties negotiated a consent decree that established percentage goals for hiring and promoting blacks. The consent decree, however, made no provision for layoffs or reductions in rank or the award of competitive seniority to black firefighters. Furthermore, the firefighters union, which had a collective bargaining agreement with the City of Memphis, was not made a party to the consent decree.

When the City of Memphis announced proposed layoffs in May 1981 based on the last-hired, first-fired provisions of the union contract, the black firefighters were quick to respond. They brought a motion for a preliminary injunction preventing layoffs on a seniority basis, contending that any seniority-based layoff would violate the affirmative action provisions of the consent decree. The District Court's order granting such an injunction was the subject of the Supreme Court's review.

The Supreme Court held that the central issue in the case was whether the district court exceeded its powers in entering the injunction requiring white employees to be laid off when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority. The high Court reasoned that it was inappropriate to affirm the injunction on a contract theory because the consent decree never addressed the issue of reductions in force or the application of the seniority system. Furthermore, since neither the union nor the non-minority employees were parties to the suit when the 1980 decree was entered, the decree could not be held to indicate any agreement by them to any of its terms.

The Supreme Court went on to hold that Section 703(h) of Title VII permits the routine application of a seniority system absent proof of an intention to discriminate, and the seniority provisions of the union contract were enforceable where there was no evidence by members of plaintiff's class that they had been actual victims of a discriminatory practice and should be awarded competitive seniority.

The short-term effects of the decision are clear — in the settlement of any race or sex discrimination case involving union hiring or promotions, employees must seek the union's participation in the negotiation of any consent decree, must include the seniority system as a subject of negotiation, and should obtain where possible the award of competitive seniority to specifically identified victims of discrimination. Where defendants are unwilling to award retroactive seniority in settlements — possibly in fear of reverse discrimination claims by white union employees — plaintiffs will have to try their case in order to obtain rulings that they were subject to discrimination and deserved retroactive seniority.

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UNION leaders in future bargaining sessions will be caught in a very delicate position. Female and minority union members will demand that affirmative action goals be tied to layoffs and that current seniority provisions be modified. Such changes, however, would impact negatively on the unions' largest constituency — white male workers — and will be the subject of fierce debate.

It must be remembered that the seniority exemption to Title VII is a principle of statutory law — and as such can be amended by Congress. Once civil rights leaders have had an opportunity to review the Supreme Court decision, they may bring strong pressure on Congress to amend Title VII.

Where union or nonunion employers have not adopted seniority systems in the past, they will find it difficult to do so in the future. An employer who has relied on a merit system for making promotion and termination decisions will have to articulate important, objective business considerations for adopting the more arbitrary and discriminatory seniority system. It is expected that courts and agencies with the responsibility for enforcing Title VII will review with suspicion any employer who jettisons the merit system in favor of a seniority system for layoffs.

Many experts in discrimination law believe that the affirmative action programs adopted in the late 1960's and during the 1970's are sufficiently old now that most female and minority employees have accrued sufficient seniority to give them appropriate protection during any layoffs. Even if many female and minority employees have some protection, the court's decision makes it clear that employees must identify any discrimination in hiring or promotion early and bring suit for a determination of their seniority rights.

Perhaps the greatest impact of the court's decision will be the attitude of the Reagan Administration regarding affirmative action. No sooner had the Supreme Court's decision been issued than William Bradford Reynolds, head of the Justice Department's Civil Rights division, announced that he would order the review and assess the validity of hundreds of court-ordered affirmative action programs where the courts had employed racial quotas and goals in hiring to effectuate appropriate relief.

Mr. Reynolds has adopted a broad interpretation of the court's decision, publicly stating that the decision went beyond seniority questions to rule out all court-mandated preferential treatment of minorities and women in employment. This interpretation seems overly broad. However, it is clear that plaintiffs and the courts will have to be careful to distinguish the court's ruling in the Memphis Fire Department case in seeking and formulating remedies in future class discrimination cases.

Those who have been the past beneficiaries of court-ordered affirmative action are left to wait for Mr. Reynolds' next shoe to drop. ■

THE NEW YORK TIMES, SUNDAY, JULY 29, 1984

LETTERS

Affirmative

To the Editor:

In considering the impact of the Supreme Court's *Memphis* decision on affirmative action ("Memphis Did Not Kill Affirmative Action," Business Forum, July 1), one must first carefully define the term.

If one defines affirmative action in what Morris Abram, Vice Chairman of the United States Commission on Civil Rights, calls its "original and undefiled meaning," then the *Memphis* decision has no impact on affirmative action. Affirmative action in its original sense means increased recruiting, training, counseling and educational opportunities, targeted to minorities and women, but open to all. This nondiscriminatory affirmative action is aimed at breaking down the "old-boy" network in hiring and promotions and providing for equal employment opportunity without regard to race or gender and without contracting such opportunity for anyone else.

Preferential affirmative action seeks to reward persons for membership in a group, even if an employer did not discriminate against those persons, at the expense of innocent individuals. The *Memphis* decision deals a sharp blow to this discriminatory form of affirmative action.

The writer, Douglas F. Seaver, suggests that "where union or nonunion employees have not adopted seniority systems in the past, they will find it difficult to do so in the future." I do not believe this will be the case. As he notes, Section 703(h) of Title VII protects an employer's use of a bona fide seniority system (as well as a bona fide merit system) which is neither adopted nor applied with an intent to discriminate on the basis of race or gender.

Indeed, the Supreme Court permitted such a seniority system to govern the order of layoffs in *Memphis*, notwithstanding an adverse impact on minority firefighters. Given the central role seniority plays in the workforce, its traditional importance to unions, and Title VII's express protection of seniority, there is no reason to expect "that courts and agencies with the responsibility for enforcing Title VII will review with suspicion any employer who jettisons the merit system in favor of a seniority system for layoffs." Employers are just as free to adopt a bona fide seniority system today as they were prior to the *Memphis* ruling, notwithstanding the adverse impact such a system may have on monorities in the layoff context — so long as the employer neither adopts nor applies such a system with an intent to discriminate.

The *Memphis* case did not involve hiring or promotions. But the Court, in reaching its result with respect to layoffs, made a crucial interpretation of Section 706(g) of Title VII. The Court repeatedly rests its decision in this case on both Section 703(h) *and* Section 706(g).

Section 706(g) is the basis for a court's remedial authority *generally* under Title VII, including the authority to order affirmative action and equitable relief, as the Court acknowledged in *Memphis*. That remedial authority encompasses hiring and promotions.

Accordingly, when the Supreme Court interprets Section 706(g) as "provid[ing] make-whole relief only to those who have been actual victims of illegal discrimination," one cannot logically separate the import of that interpretation in the layoff context of *Memphis* from its import with respect to hiring and promotions.

Indeed, the Court's heavy reliance on the legislative history of Title VII clearly demonstrates the relevance of the Court's opinion to the scope of a Federal court's Title VII remedial authority in the context of hiring and promotions. The Court's discussion of, and citations to, the legislative history of Section 706(g) makes clear that its interpretation that a court can only award make-whole relief to actual victims of an employer's illegal discrimination is of general applicability. The majority opinion quoted portions of the legislative history that specifically disclaimed any authority on the part of a court to enter an order requiring quotas.

The Court, for example, cited remarks of the principal Senate sponsors: "[u]nder Title VII, not even a Court, much less the [Equal Employment Opportunity] Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title. . . ." House Republican sponsors made similar remarks. The Court also quoted Senator Humphrey as stating: "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of [Section 706(g)]."

Thus, there is much reason to believe that court-ordered preferential treatment on the basis of race or gender in favor of non-victims of an employer's illegal discrimination and at the expense of innocent persons — such as quotas — are as impermissible under Title VII in hiring and promotions as they are in layoffs. This is a vindication of individual rights and a victory for the cause of civil rights for all.

MARK R. DISLER
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U.S. Commission on Civil Rights
Washington, July 24

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Statement of the United States Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quota

January 17, 1984*

The U.S. Commission on Civil Rights commends the city of Detroit for its desire to eradicate racial discrimination in its police department's employment practices and to increase the number of blacks in its police force. However, the Commission deplores the city's use of a racial quota in its promotion of sergeants to lieutenants as one of the methods for achieving its laudable objectives.

The courts examining the validity of the promotion quota concluded that the Detroit Police Department (DPD) engaged in pervasive discrimination against blacks from at least 1943 to the 1970s in all phases of its operations, including the hiring and promotion of employees, job assignments, and the treatment of black citizens. In July 1974 the city voluntarily adopted an affirmative action plan. One of the elements of the plan alters the method whereby sergeants are promoted to lieutenants. Prior to 1974, candidates for promotion who scored a minimum of 70 on a written test were ranked on a single list. Each candidate was accorded a numerical rating based upon a number of factors, including their score on the written examination, length of service, performance or service ratings determined by supervisors, degree of college education or credits, veterans' points, and an oral interview. Promotions were given to the highest ranking candidates on the list in numerical order until all available positions were filled.

The affirmative action plan does not change the basic criteria for determining which sergeants receive promotions to lieutenant. The plan, however, requires that two separate lists be compiled—one for black sergeants and the other for white sergeants. Rank on both lists is determined by use of the same numerical rating system in effect prior to 1974. Promotions are made alternately from each list so that one black officer is promoted for each white officer until 50 percent of the lieutenant corps is black, an event not expected to occur until 1990. Pursuant to the plan, a number of black sergeants have been promoted instead of white sergeants who would have ranked ahead of them if a single list had been used. The Supreme Court decided last week not to hear the case *(Bratton* v. *City of Detroit).*

The DPD's promotion quota is factually similar to one currently at issue in the case involving the New Orleans Police Department *(Williams* v. *City of New Orleans),* pending before the full U.S. Court of

* The Commission adopted the statement concerning the Detroit Police Department's racial promotion quota on January 17, 1984, by a 6–2 vote. Commissioners Mary Frances Berry and Blandina Cardenas Ramirez dissented.

Appeals for the Fifth Circuit. It differs from the Memphis Fire Department case now before the Supreme Court. The Memphis case involves seniority-based layoffs that would reduce the prelayoff percentage of black employees, a number of whom were hired and promoted following the city of Memphis' earlier agreement to two consent decrees.

In the Commission's view, enforcement of nondiscrimination law in employment must provide that all of an employer's discriminatory practices cease and that any identifiable individual who has been the direct victim of discrimination be returned to the place he or she would have had in the work force in the absence of the employer's discrimination. Thus, each identifiable victim of the employer's discriminatory employment practices should be made whole, including the provision of backpay and restoration to his or her rightful place in the employer's work force at the next available opening. Such relief should also, when appropriate, accord a seniority status to the victim of discrimination higher than that of an innocent employee who would have been junior to the victim of discrimination in the absence of their employer's discrimination (here the innocent third party properly must share the burden of his or her employer's discrimination against identifiable victims in order to afford an adequate remedy to those victims). These kinds of relief, of course, must be available in cases involving a whole class of actual victims of discrimination, as well as cases involving only one such victim.

In addition, the use of affirmative action techniques, as tools to enhance equal opportunity for *all* citizens rather than as devices to penalize some on account of their nonpreferred racial, gender, or other status, should also be required of employers found to have discriminated, and encouraged for all employers who wish to improve the quality of their work force. These techniques include: (1) additional recruiting efforts, aimed at increasing the number of qualified minority (or female) applicants from which the employer undertakes nondiscriminatory, race- and gender-neutral hiring; (2) training, educational, and counseling programs for applicants and employees, targeted to attract minority (or female) participants and to enhance their opportunities to be hired or promoted on the basis of merit (rather than race or gender), but open to all on an equal basis.

"Simple justice" is not served, however, by preferring nonvictims of an employer's discrimination over innocent third parties solely on account of their race in any affirmative action plan. Such racial preferences merely constitute another form of unjustified discrimination, create a new class of victims, and when used in public employment, offend the constitutional principle of equal protection of the law for all citizens. The DPD's promotion quota benefits nonvictims as well as victims of past illegal discrimination in promotions in derogation of the rights of innocent third parties, solely because of their race. Accordingly, it is a device that should be eschewed, not countenanced.

The Commission believes that the use of racially preferential employment techniques, such as quotas, is not properly viewed as a situation pitting the interests of blacks against the interests of whites. Rather, each specific preferential plan favors members of the preferred group—of whatever race or gender—at the expense of the nonpreferred group, which inevitably includes persons of diverse ethnic, religious, or racial groups, and sometimes includes females. Members of these groups have often been subject to past discrimination. Thus, in the New Orleans Police Department case, separate groups of Hispanic and female police officers, in addition to a group of white officers, intervened to object to the promotion quota favoring black males.

The Commission also rejects an "operational needs" justification for racial quotas, as Detroit advanced in favor of its promotion quota. The city asserts that it needs to increase black police officers at all ranks, in order to achieve more effective law enforcement and reduce discriminatory treatment against black citizens, and that the promotion quota was a necessary means of meeting those objectives. This justification amounts to little more than a claim that only black police officers can effectively provide law enforcement services to black citizens or supervise lower ranking black police officers. Such a claim has no place in a free, pluralistic society made up of many diverse ethnic and racial groups striving to achieve fully the goal of becoming one nation. If accepted, it would justify a claim that members of a racial or ethnic group can be properly served or treated only by fellow members of that group, e.g., only black teachers can teach black children—or that only white teachers can teach white children. This claim would, in the words of Chief Justice Earl Warren, "turn the clock back" (*Brown* v. *Board of Education* (1954)) to the "separate but equal" days of the past, when public entities dispensed benefits, entitlements and penalties of all kinds on the basis of a person's skin color. Such a claim, in short, would ultimately divide the Nation rather than unite it.

The alternatives to racially preferential employment policies that a police department can use to meet its needs for more effective, and nondiscriminatory, law enforcement include: (1) vigorous enforcement of policies of nondiscriminatory treatment of all citizens by its members, including the disciplining or dismissal of offending officers, and (2) provision of training and counseling programs for its officers to instruct and counsel them in the requirements of nondiscriminatory law enforcement.

Nearly 25 years ago, Arthur L. Johnson, executive secretary of the Detroit branch of the National Association for the Advancement of Colored People, testified about the poor relations between black citizens and the DPD before this Commission's predecessor. He said, in part, "At absolutely no point in their experience do Negroes in Detroit see the law enforcement agency as being truly color-blind. . . ."

Unfortunately, the DPD's use of racial quotas demonstrates that it is still not truly colorblind, at least with respect to its employment practices.

Because the issues in the Detroit case are of such importance, the Commission is disappointed that the Supreme Court has declined to hear the case. The issue of racial quotas in promotions, as well as in hiring, will undoubtedly be presented for Supreme Court review in the future. The Commission hopes the Court will resolve the issue by reaffirming the principle of nondiscrimination and forbidding preferential treatment based on race, color, gender, national origin, or religion in favor of nonvictims of discrimination at the expense of innocent individuals.

Statement of the United States Commission on Civil Rights Concerning *Firefighters* v. *Stotts*

July 17, 1984*

The U.S. Commission on Civil Rights applauds the decision of the Supreme Court in *Firefighters* v. *Stotts* (June 12, 1984)—the Memphis layoff case. Contained in the Court's opinion on section 706(g) of Title VII and in the legislative history of the 1964 Civil Rights Act is a reaffirmation of the principle that race and gender are not proper bases to reward or penalize any person. The decision retains the strong relief available for actual victims of an employer's illegal discrimination, including entire classes of such victims. Moreover, it leaves intact nondiscriminatory affirmative action methods favored by the Commission such as increased recruiting, training, counseling, and educational programs. It properly denies a court, however, the authority under Title VII to use discrimination in order to remedy discrimination.

In the decision, the Supreme Court held that, under Title VII, an employer may lawfully apply bona fide seniority rules to govern the sequence of employee layoffs rather than forego the use of such rules in order to preserve the percentage of racial minorities in the work force when those minorities were not the actual victims of the employer's illegal discrimination.

In so holding, the Supreme Court also stated that a court can order make-whole relief under Title VII only for *actual* victims of an employer's illegal discrimination. The Court, then, not only preserved the validity of bona fide seniority systems, but also vindicated the important general principle that rights inhere in individuals, not in groups. The Court's pronouncement in *Stotts* is fully consistent with Commission policy that make-whole relief to actual victims and nondiscriminatory affirmative action are the proper remedies under Title VII and that "preferring nonvictims of an employer's discrimination over innocent third parties solely on account of their race [or gender is inappropriate] in any affirmative action plan." *(Statement of the United States Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quota,* January 17, 1984.)

In *Stotts,* black firefighters sued the Memphis, Tennessee, Fire Department and other city officials under Title VII and other statutes alleging a pattern and practice of racial discrimination in the fire department's hiring and promotion decisions. The city agreed to a consent decree in 1980 providing, among other relief, hiring and promotional goals. The city did

* On July 11, 1984, the Commission adopted two statements. The statement on *Firefighters* v. *Stotts* was adopted by a 4–2 vote, with Commissioners Pendleton, Abram, Bunzel, and Destro in favor and Commissioners Berry and Ramirez opposed. The *Hishon* v. *King and Spalding* statement was adopted by a 4–0 vote, with Commissioners Pendleton, Abram, Bunzel, and Destro in favor. Commissioners Berry and Ramirez supported the Court's decision but declined to vote. Commissioners Guess and Buckley did not attend the meeting and did not vote.

not admit that it had discriminated against anyone. Under an earlier, similar consent decree applicable citywide, the percentage of black employees in the fire department increased from approximately 4 percent to 11½ percent in 1980.

In May 1981 a budget deficit led the city to seek to lay off some of its firefighters. The city sought to conduct the layoff according to its seniority rules, which were also part of an agreement it had with the Firefighters Union.

The black plaintiffs obtained a court order enjoining the city's use of its seniority rules in a manner that would reduce the percentage of black firefighters then employed in the fire department.

Thereafter, the city laid off some white firefighters with greater seniority than some black firefighters who were retained in the work force—in derogation of the city's seniority policy.

The U.S. Court of Appeals for the Sixth Circuit affirmed the lower court's entry of the injunction. The Supreme Court reversed the appellate court's decision.

In holding that the city may apply its seniority rules despite their adverse impact on less senior black firefighters, the Supreme Court relied, in part, on section 703(h) of Title VII, which specifically protects an employer's bona fide seniority system.[1] Under the Court's holding, an employer need not disregard its bona fide seniority policy and lay off, on the basis of race, more senior employees in order to preserve the jobs of less senior employees who were not actual victims of an employer's discrimination.

Indeed, as the Supreme Court's description of its earlier decision in *Teamsters* v. *United States* makes clear, a court may only provide competitive seniority to actual victims of an employer's illegal discrimination under Title VII, even where, as in *Teamsters*, layoffs were not at issue.

In determining that a court's remedial authority under Title VII extends only to actual victims of an employer's illegal discrimination, the Court interpreted section 706(g) of Title VII.[2] Section 706(g) governs a court's remedial authority generally under Title VII. The Court stated that the last sentence of this provision limited a court's remedial authority as reaching only actual victims of an employer's illegal discrimination.

In coming to this conclusion, the Court relied extensively on Title VII's 1964 legislative history and also relied on the legislative history of the 1972 amendments to Title VII. For example, the Supreme Court cited Senator Humphrey's 1964 remark that:

> "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as §706(g)]. . . .Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require. . .firing. . .of employees in order to meet a racial 'quota' or to achieve a certain racial balance.[3] That bugaboo has been brought up a dozen times; but is nonexistent." 110 Cong. Rec. 6549 (remarks of Sen. Humphrey).

The Court also cited other examples of congressional intent:

An interpretative memorandum of the bill entered into the Congressional Record by Senators Clark and Case [who were the bipartisan floor captains of Title VII and whose memorandum we have previously recognized as authoritative] likewise made clear that a court was not authorized to give preferential treatment to non-victims. "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated

> No order of the court shall require the admission or reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of 704(a) of this title.

42 U.S.C. §2000e–5(g) (1982).

[1] Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . .provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." 42 U.S.C. §2000e–2(h).

[2] Section 706(g) affects the remedies available in Title VII litigation, and provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . .or any other equitable relief as the court deems appropriate. . . .

[3] Indeed, Senator Humphrey's complete remark in this sentence reads: "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require *hiring*, firing, *or promotion* of employees in order to meet a racial 'quota' or achieve a certain racial balance." (Emphasis supplied to the portion of the remark not cited by the Court.)

expressly in the last sentence of section [706(g)]. . . ." *Id.* at 7214.

Similar assurances concerning the limits on a court's authority to award make-whole relief were provided by supporters of the bill throughout the legislative process. For example, following passage of the bill in the House, its Republican House sponsors published a memorandum describing the bill. Referring to the remedial powers given the courts by the bill, the memorandum stated: "*But Title VII does not permit the ordering of racial quotas in business or unions.*" *Id.* at 6566 [emphasis added by the Court]. In like manner, the principal Senate sponsors, in a bipartisan news letter delivered during an attempted filibuster to each Senator supporting the bill, explained that "[u]nder title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." *Id.* at 14465.

We believe the cause of equal justice under law is well-served by the *Stotts* decision. While more needs to be achieved, we trust that the tide has begun to turn decisively against preferential treatment, such as quotas, on the basis of race, national origin, and gender, and in favor of evenhanded civil rights enforcement for *all* American citizens.

Statement of Commissioner John H. Bunzel

It is plain nonsense to say that the Supreme Court's decision in *Firefighters* v. *Stotts* is a setback for civil rights and therefore another victory for those who want to dismantle affirmative action. Nor is the Court's decision, as some would have us believe, a triumph of backward-looking conservatism over progressive liberalism.

To speak in these terms is to substitute polemics and sloganeering for careful thought and analysis.

Senator Hubert Humphrey, throughout all of his life one of the Nation's leading activists in the civil rights movement, would have found in the majority opinion of the Court confirmation of his own position when the Civil Rights Act was debated and passed in 1964. Senator Humphrey made it very clear that, among other things, the intent of Congress in Title VII was to protect bona fide seniority systems.

What the Supreme Court has now done is reaffirm what Senator Humphrey, along with the liberal-labor alliance and his other colleagues from both political parties in Congress, expressed in unambiguous language 20 years ago.

The Court has also reaffirmed a fundamental principle embodied in the Civil Rights Act and one to which liberals and conservatives have long been committed—namely, that in our democratic society rights belong to individuals, not to groups.

The great majority of our citizens support nondiscriminatory affirmative action for the same reason that they oppose quotas and racially preferential treatment in hiring, firing, or promotion: they believe that a person should be judged on the basis of individual merit and not because of his or her race, color, or background. That is what equal opportunity is all about. It is not a liberal or conservative proposition, but an American idea and promise.

If the Supreme Court continues to build on its decision in *Stotts*, it will bring closer the day that race will become less, and not more, of a factor in our search for equal justice for all Americans under the law.

Statement of Commissioner Robert A. Destro

I concur in the Commission's statement on the Memphis firefighters case *(Firefighters* v. *Stotts,* 104 S.Ct. 2576 (1984)), but write separately to highlight two additional concerns that have largely been ignored in the aftermath of the Supreme Court's decision: the contribution of bona fide seniority plans to the protection of all workers generally, and the constitutional duty of Federal courts to apply the law as Congress wrote it.

There has been much criticism of the Supreme Court's decision in the *Stotts* case. Most of it, in my judgment, has not been justified. The Memphis seniority system was expressly found by the Court of Appeals for the Sixth Circuit to have been nondiscriminatory. As a result, the individuals who had acquired rights under that seniority system were entitled to protection in the courts by the express language of Title VII. The Supreme Court's opinion can be characterized as a "defeat" for civil rights only if one accepts the proposition that courts may ignore the law as written whenever the subject matter of the litigation is civil rights.

Bona fide, nondiscriminatory seniority systems are critical to the job security and advancement of millions of American workers and their families, including many minorities and women. The right to bargain collectively was recognized in this country only after the blood of American workers had been shed in the streets. Government antipathy towards the collective bargaining rights of workers was a prominent feature of that unfortunate period of American labor history. Thus, it was not surprising that one of the leading arguments against enacting Title VII was that it would destroy seniority rights. The consistent response of the supporters of the bill was to deny that Congress intended to subordinate bona fide seniority systems to racially preferential hiring or layoff plans. Senators Clark and Case, the "bipartisan captains" who were responsible for guiding Title VII through the Senate, stated that "Title VII would have no effect on established seniority rights."[1] Similarly, the Justice Department stated that Title VII "would have no effect on seniority rights" and gave the following example:

> If, for example, a collective bargaining contract provides that in the event of layoffs, those who were last hired must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where, owing to discrimination prior to the effective date of the Title, white workers had more seniority than Negroes.[2]

The record, therefore, is clear: Title VII was a compromise that allowed for an award of retroactive seniority for proven victims of discrimination, but did not allow for the elimination of seniority rights.

The reasons for this compromise should be apparent. Nondiscrimination laws and labor laws that protect collective bargaining contracts are comple-

[1] 110 Cong. Rec. 7213 (1964), quoted in Teamsters v. United States, 431 U.S. 324, 350 (1977).

[2] 110 Cong. Rec. 7207 (1964), quoted in Teamsters v. United States, 431 U.S. at 351 (1977).

mentary facts of the Nation's labor policy. Title VII was (and is) needed to protect the working person against unlawful discrimination on the basis of race, sex, religion, or national origin. The labor laws are needed to protect the rights of the worker to bargain collectively and avoid unfair labor practices. A seniority system, collectively bargained for and fairly administered, has a social value and utility all its own.

Because seniority is not inconsistent with affirmative action, properly understood, the *Stotts* case is not a defeat for affirmative action. Affirmative action seeks to foster greater minority involvement in the work force at the entry level, and seniority systems operate above the entry level to protect all workers. Seniority systems will, in time, assure that the gains that are made through affirmative action will not be lost through discrimination. It would be foolish indeed to sweep away one of labor's greatest protections on the ground that it may sometimes operate to the short-term disadvantage of minorities and women. Unfortunately, "last hired, first fired" is a short-term disadvantage that is inherent in seniority systems, but this does not make seniority systems unfair. Once above the bottom rungs, safely protected by seniority, an employee's position is secured by both seniority and Title VII from the kind of discrimination that infects other more "unstructured" workplaces. The trade is not unreasonable, and all workers who attain seniority benefit from it.

The frustration of the minority community, however, is well-justified. The *Stotts* case is a reminder that vestiges of the discrimination openly practiced against it remain a problem in the workplace. In addition, unions have not historically been the champions of minority and women workers. Unions as well as management often slammed the window of opportunity in any face that was not white or male. This is what affirmative action and antidiscrimination laws were designed to remedy and prevent. In my judgment, unions have a moral obligation of fairness to all workers in the Nation that springs not only from notions of solidarity in the workplace, but also from their legally protected position as the bargaining agents of their members. They, along with management and government, have the responsibility of assuring that all workers are treated equally, regardless of race, sex, creed, or national origin. Organized labor, therefore, has a critical role to play in the process of breaking the barriers of present and past discrimination. But destroying seniority systems that are not *in and of themselves* discriminatory will not further that role. They protect workers, regardless of race, sex, ethnicity, or creed, and are the foundation stone on which most collective bargaining agreements rest.

We should be wary whenever government—in this case a Federal court—claims that power to deprive workers of such an important right in a manner inconsistent with written law. American society is held together by formal and informal agreements among the citizenry: constitutions, laws (which represent legislative compromises), contracts, and collective bargaining agreements. All are, ideally, designed to further justice and the public welfare. Title VII is one of those agreements embodied in a legislative compromise. For a Federal court simply to "decree" that a worker's contractual rights are to be set aside on the basis of his or her race, in the absence of a showing that an identifiable victim of discrimination must be compensated, perverts not only our system of justice "under law," but turns the traditional notion of equality before the law on its head.

This brings me to the role of the judges in this debate. The duty of a judge is to apply the law as it is written, and this is especially true of the civil rights laws, which are carefully crafted to address specific needs and rights. In the employment discrimination context, the power of the courts is derived from Title VII of the Civil Rights Act of 1964. Contrary to arguments I have read and heard in various academic and legal circles, no branch of the Federal Government, including the Federal courts, has "inherent" power beyond that which the Constitution and laws of the United States confer. The Supreme Court wisely faced this important issue squarely and rejected arguments that Federal courts have "inherent" authority to enforce their decrees in ways that are inconsistent with the statute upon which their authority rests. This is no defeat for civil rights; it is a reaffirmation that justice, in our system, is "under law" and that civil rights law is designed to protect the rights of all.

Whether we like it or not, protection of civil rights in this country depends on the commitment of the American people to the constitutional ideal of individual equality before the law. This is not to say that majorities define what is morally sound, for they are often misguided and need reminders that certain values are too important to be left to politics-as-usual. The Constitution is such a reminder. It limits the power of majorities to impose their will on minorities,

and it limits the power of Federal judges to substitute their judgment for the law written by Congress.

As Justice White's opinion for the Court makes clear by quoting the late Senator Hubert Humphrey, the operative sections of Title VII were a legislative compromise. Promises were made to obtain votes that otherwise would not have been there for passage. That compromise defines the "consent of the governed," and no unelected court has the right under our Constitution to substitute its judgment for that consent. If it did, there would be no need to *have* a Congress that is often mired in messy political squabbles and unseemly compromises concerning the public interest. All we would need would be a friendly magistrate who would "do justice." What could be easier? Nothing, but democracy as we know it would be gone.

It is for these reasons that I concur and join in the Commission's statement.

Statement of Commissioners Blandina Cardenas Ramirez and Mary Frances Berry

As we consider the *Hishon* decision, we continue to be dismayed at the shoot-from-the-hip pattern of decisionmaking in which our colleagues indulge. There is nothing in the work of the reconstituted Commission to substantiate any change in our previous policies concerning Title VII of the Civil Rights Act of 1964. We have yet to convene hearings to listen to affected persons or from the public at large about the impact of any possible change in policies or the continued viability of existing Title VII remedies. Conversely, there is abundant evidence in studies by the Commission, including the 1981 statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination,* that makes us "satisfied" also with the *Hishon* decision.

In their statement concerning *Stotts,* once again our colleagues in the majority insist on putting blinders on society concerning the tragic present and past effects of discrimination. Civil rights laws were not passed to give civil rights protection to *all* Americans, as the majority of this Commission seems to believe. Instead, they were passed out of a recognition that *some* Americans already had protection because they belonged to a favored group; and others, including blacks, Hispanics, and women of all races, did not because they belonged to disfavored groups. If we are ever to achieve the real equality of opportunity that is the bright hope and promise of America, we must not deny our history and present condition by substituting illusion for reality.

The Commission majority applauds the Court in *Stotts* for doing what it did not do. Nowhere does the Supreme Court decision state that preferential treatment cannot be used to remedy past discrimination for a class in nonseniority cases. In fact, the Court, after *Stotts* was decided, refused to hear an appeal from the Buffalo school desegregation decision that required the local school board to hire one minority teacher for every white teacher until the schools' faculties reflected the city's 21 percent minority population. The Court's refusal left standing a lower court order, even though the hiring violated the seniority system established by State law and collective bargaining. Coming on the heels of the same Court's refusal to grant *certiorari* in the Detroit Police Department case, it is unclear what the Court will decide in seniority cases on a different set of facts. But it is clear that statistical remedies to address discrimination have not been rejected by the Supreme Court. The Court may reach such a conclusion, but despite the Commission majority's preference, it has not yet.

Even more interesting is that in *Stotts,* the Court majority made the novel pronouncement that if a seniority system was adopted with discriminatory intent, a nonminority employee with seniority can be displaced in order to make whole a proven victim of discrimination. This means that if civil rights lawyers can absorb the costs of litigation involved in a full-scale trial proceeding, they can prevail.

It is true the Court in *Stotts* decided that, in the absence of proof of intentional discrimination in the adoption of a seniority plan, seniority takes precedence over protecting the gains made as a result of an affirmative action consent decree. In addition, the Court majority opinion does include some disturbingly ambiguous language about Title VII remedies helping

only "actual victims." The discussion is ambiguous because "actual victims" of discrimination include people who never applied for jobs because they knew employers did not even accept applications from blacks, for example. For the Commission majority to seize on the ambiguous language as if it were the holding in the case betrays an unseemly eagerness to further debilitate the struggle for equal employment opportunity in our society.

We will have to wait for later cases to see what the Court means by its ambiguous statements concerning victims and make-whole relief. In particular is this so because the majority did not overrule the *Bakke* case. The writer of the majority opinion in *Stotts*, Justice White, joined three other Justices in a concurrence supporting Justice Powell's opinion in *Bakke* that Title VII does not bar the remedial use of race. Also, the legislative history of the 1972 amendments to Title VII shows bipartisan support for courts to order classwide remedial relief for Title VII violations. Furthermore, the original consent decree underlying the litigation in *Stotts*, like most Title VII consent decrees, did not require the identification of individual victims or for the employer to admit discrimination. By definition, therefore, as the dissenters pointed out, promotions and backpay went to people who were never shown to be "actual victims." The majority opinion does not challenge this result at all. The better part of valor is to avoid overdrawn generalizations from *Stotts*.

But if, as the Commission majority and President Reagan prefer, the Court should prohibit all race- or sex-conscious affirmative action remedies, that should be cause for dismay rather than glee. Commission studies, including *Social Indicators of Equality for Minorities and Women* and *Unemployment and Underemployment Among Blacks, Hispanics, and Women*, underscore the fact of continued employment disparities even for women and minorities who are educated and trained. Our studies, including the 1981 affirmative action statement, emphasize the efficacy of statistical remedies, goals, and timetables, and in the most egregious cases, in ensuring actual hiring and promotion of women and minorities. Just as businesses measure progress in production and other areas by numerical targets, so should they measure progress in affirmative action.

If as a nation we forsake the commitment to measurable affirmative action, we will erode our current efforts to ensure real equality of employment opportunity. Under such circumstances, we will be abandoning the quest for Martin Luther King's dream that by acting in this generation we would speed up the day when people "will not be judged by the color of their skin but the content of their character." As King acknowledged, the Constitution is colorblind, but the people were not and are not. If affirmative action is to mean nothing more than what our colleagues believe, let us hear no more about its empty promises and let us end the hypocrisy here and now.

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